(1)

Supreme Court, U.S.
FILED

001755 MAY 23 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CHARLES FREEMAN and ROSALYN BROWN,

Petitioners,

v.

THE CITY OF DALLAS, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL M. DANIEL
Counsel of Record
LAURA B. BESHARA
Attorneys for Petitioners

MICHAEL M. DANIEL, P.C.
3301 Elm St.
Dallas, TX 75226
(214) 939-9230
(214) 741-3596 fax

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

127 PP

QUESTION PRESENTED

Did the City's dispatch of a work crew that entered petitioners' property and seized and demolished two small substandard apartment buildings by order of a City board but without a warrant or other judicial process violate the prohibition against unreasonable seizures in the Fourth Amendment and the prohibition against causing deprivations of property without due process in the Fourteenth Amendment?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	15
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES:

Burns v. City of Dallas, 1997 U.S. Dist. LEXIS 16666 (N.D. Tex. 1997) 12

Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967) ..... *passim*

City of Houston v. Lurie, 224 S.W.2d 871 (Tex. 1949) 28

City of Milwaukee v. Arrieh, 565 N.W.2d 291 (Wis. Ct. App. 1997), *review denied*, 569 N.W.2d 589, *cert. denied*, 522 U.S. 1092 (1998) 21

City of Texarkana v. Reagan, 247 S.W. 816 (Tex. 1923) 28

Connecticutt v. Doehr, 501 U.S. 1 (1991) 29

Conner v. City of Santa Ana, 897 F.2d 1487 (9th Cir. 1990), *cert. denied*, 498 U.S. 816 (1990)..15, 16, 17, 20, 21

Crossman v. City of Galveston, 247 S.W. 810 (Tex. 1923) 18, 19, 28

Flatford v. City of Monroe, 17 F.3d 162 (6th Cir. 1994) 17

Frank v. Maryland, 359 U.S. 360 (1959) 15

Freeman v. City of Dallas, 200 F.3d 884 (5th Cir. 2000) 14

G.M. Leasing v. United States, 429 U.S. 338 (1977) 16

Hart v. City of Dallas, 565 S.W.2d 373 (Tex. Civ. App. Dallas 1978) 28

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) 27, 30

Hroch v. City of Omaha, 4 F.3d 693 (8th Cir. 1993) 17

Illinois v. McArthur, 531 U.S. 326 (2001) 23

TABLE OF AUTHORITIES – Continued

Page

James v. City of Dallas, 2000 U.S. Dist. LEXIS 4633 (N.D. Tex. 2000) 12

Lawton v. Steele, 153 U.S. 133 (1894) 18, 19

Manchester Terminal v. Texas Marine Transportation, 781 S.W.2d 646 (Tex. Civ. App. Houston 1st District 1990) 28

Mathews v. Eldridge, 424 U.S. 319 (1975) 29

Michigan v. Tyler, 436 U.S. 499 (1978) 16

Morgan v. U.S., 304 U.S. 1 (1938) 29, 30

Nussbaum v. City of Dallas, 948 S.W.2d 305 (Tex. Civ. App. Dallas 1996) 6

Price v. City of Junction, 711 F.2d 582 (5th Cir. 1983) 16

Rowland v. State of Florida, ex rel. Martin, 129 Fla. 662, 176 So. 545 (1937) 18

See v. Seattle, 387 U.S. 541 (1967) 15, 21, 27

Shaffer v. City of Atlanta, 154 S.E.2d 241 (Ga. 1967) 28

Simmons v. U.S., 348 U.S. 397 (1963) 30

Soldal v. Cook County, Ill., 506 U.S. 56 (1992) 17, 19, 21, 26, 27

State v. Anthony, 647 N.E. 2d 1368 (Ohio 1995) 21

Swann v. City of Dallas, 922 F.Supp. 1184 (N.D. Tex. 1996) 12

Thomas v. City of Dallas, 175 F.3d 358 (5th Cir. 1999) 12

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 17, 26, 29

TABLE OF AUTHORITIES – Continued

Page

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) 23

CONSTITUTION, STATUTES AND REGULATIONS:

Fourth Amendment to the U.S. Constitution..... *passim*

Fourteenth Amendment to the U.S. Constitution....*passim*

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983..... 13

TEXAS LOCAL GOVERNMENT CODE:

§ 54.031 4

§ 54.032 5

§ 54.033 5

§ 54.036 5

§ 54.039 .....5, 6

§ 54.039(e)..... 6

§ 54.039(f)..... 5

§ 54.039(h) 5

§ 214.001 .....4, 5

MISCELLANEOUS:

Annotation: Validity and Construction of Statute or Ordinance 19

Providing for Repair or Destruction of Residential Building by Public Authorities at Owner's Expense, 43 A.L.R. 3d 916 19

TABLE OF AUTHORITIES – Continued

Page

Dallas City Code § 27 4

Dillon, *Commentaries on the Law of Municipal Corporations*, Vol. II, pages 1044-1048 (1911) 18

Fed. R. Crim. P. 4(a), (b)..... 25

Fed. R. Crim P. 41..... 25

Mandelker, "Housing Codes, Building Demolition, and Just Compensation: A Rationale For The Exercise of Public Powers Over Slum Housing," 67 Mich. L. R. 635 (1969) 18, 19, 27

Note, "Enforcement of Municipal Housing Codes," 78 Harv. L. R. 801 (1965)..... 19

Note, "Municipal Housing Codes," 69 Harv. L.R. at 1116.....18, 19

Spector, "Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home," 31 Conn. L. Rev. 547 (1999) 20

39 Am. Jur. Nuisances §§ 77, 117, 183-193 (1942) 18

PETITION FOR A WRIT OF CERTIORARI

Petitioners Charles Freeman and Rosalyn Brown respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (App. 1-55)[1] is reported at 242 F.3d 642. The court of appeals' order granting a rehearing en banc is reported at 200 F.3d 884. The opinion of the panel of the court of appeals (App. 56-83) is reported at 186 F.3d 601. The orders of the district court (App. 84-90) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

---

[1] "App." refers to the appendix bound with this petition for a writ of certiorari.

searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." Fourth Amendment to the United States Constitution.

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . " Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT

Petitioners Charles Freeman and his sister, Rosalyn Brown, owned the land and the small, vacant, multi-family structures located at 2611 and 2621 Meyers St., in Dallas, Texas. R-1, 76.[2] Mr. Freeman was in the process of rehabilitating these apartments for use as rental property.[3] R-1, 76-77.

Mr. Freeman arrived at his property and found a demolition crew tearing down one of his buildings. The crew had already razed his other building on the adjoining property, broken up the foundation, and cleared that lot. R-8, 62-64.

---

[2] In this Petition, citation to the Record on Appeal in the Fifth Circuit is by "R-___, ___." R-___ refers to the Record Volume number and is followed by the page number.

[3] Mr. Freeman owned a 1% interest and Ms. Brown owned a 99% interest in the properties. Mr. Freeman was the attorney-in-fact for Ms. Brown. R-1, 76.

Mr. Freeman jumped onto the demolition crew's backhoe, told the operator that he was repairing the building, asked him to stop the demolition. The demolition crew stopped work but called the police. R-8, 64. The City police arrived and ordered Mr. Freeman to vacate his property or face arrest. R-8, 65. Mr. Freeman left the property and watched the demolition crew continue to tear down the building. R-8, 65. The police did not allow him to remove his personal property or building materials from the building. R-8, 70. The City's crew knocked down the rest of the building, broke up and removed the foundation, and cleared the lot. R-8, 66.

The City assessed $15,610.27 against Mr. Freeman and Ms. Brown for the costs incurred by the City in demolishing the structures. R-1, 93, 106. The City placed liens on the properties for the assessed amount and accruing interest. R-1, 117-118. The City did not provide Mr. Freeman or Ms. Brown with an opportunity to contest the assessed costs or the liens. R-1, 117.

The only authorization for the entry and seizure was the demolition order issued by the Urban Rehabilitation Standards Board [URSB], the City's citizen volunteer board. (App. 88.)

No emergency or other exigent circumstances required the immediate removal of the buildings. R-1, 77-78. The buildings were boarded up and secure from unauthorized entry. The City inspector could not even find a way to enter one building for an inspection of the interior. R-1, 77-78. The City introduced no evidence that the properties were hazards at the citizen board hearings. R-1, 81-84, 87-93, 96-98, 101-105. Instead, the comments

by the Board chair and other members showed that these eight-unit apartment buildings were in fact repairable properties. However, the Board members doubted that Mr. Freeman had the financial resources to repair the buildings. R-1, 83, 103-105. The City's cost estimates, when broken down by unit, are $10,500 per unit for one building and $13,585 per unit for the other. S.R.E. 13, 14, 25, 26.[4] Mr. Freeman testified that he had various materials on hand and that he could repair the properties for approximately $2,000 per unit. R-1, 101-105. One City employee commented that demolition of Mr. Freeman's buildings was appropriate because in her opinion the entire neighborhood needed to be demolished. R-1, 104. The City waited more than six months after its citizen volunteer board issued the demolition orders before seizing the properties for demolition. R-1, 77-78.

Neither the City's ordinance in effect at the time nor the state statute on demolition of substandard buildings required the City to obtain judicial warrant or other judicial authorization before seizing and demolishing buildings. Tex. Loc. Gov't Code Ann., §§ 54.031, et seq., §§ 214.001, et seq. (Vernon 1999); Dallas City Code § 27.

The state statute establishing the quasi-judicial process the City uses to demolish buildings is Texas Local Government Code, §§ 54.031, et seq., Subchapter C. Quasi-Judicial Enforcement of Health and Safety

---

[4] "S.R.E. ___" refers to Mr. Freeman's and Ms. Brown's Supplemental Record Excerpts filed in the Fifth Circuit.

Ordinances.[5] The statute allows the City to appoint a commission to hear and determine cases relating to violations of the housing codes and other ordinances. Tex. Loc. Gov't Code § 54.032, § 54.033. The commission has the power to declare a building substandard, enter on private property to remove persons and property, issue orders and directives to any peace officer of the state or the chief of police to enforce and carry out the orders and directives of the commission, and assess civil penalties. Tex. Loc. Gov't Code § 54.036.

Judicial review of the commission's decision is pursuant to a request for a discretionary writ of certiorari to the state district court.[6] Tex. Loc. Gov't Code § 54.039. The judicial review is limited to determining whether there was substantial evidence for the commission decision. Tex. Loc. Gov't Code § 54.039(f). The property owner, even if successful, cannot recover costs or attorneys' fees. The City, even if the court modifies the order, is entitled to an award of attorneys' fees, costs, and expenses. Tex. Loc. Gov't Code § 54.039(h).

Mr. Freeman did not attempt to file a writ of certiorari for review of the demolition orders for his buildings. (App. 7). If Mr. Freeman had appealed the board

---

[5] There is a parallel statute allowing the "municipality" rather than a City commission to order demolition. Tex. Local Gov't Code Ann., § 214.001, et seq. (Vernon 1999).

[6] The Fifth Circuit en banc majority's citation to the judicial review for state agency action, Texas Government Code § 2001.174, at App. 4, is inexplicable as support for the judicial review available for the URSB decision. That provision applies by its own terms only to state agencies, not City commissions. Tex. Gov't Code Ann., § 2001.001, § 2001.003(7) (Vernon 2000).

demolition orders to district court, it would not have stayed the demolition orders concerning his buildings. The judicial review available does not include preliminary relief from the operation of the demolition order. Even if the district court grants the writ and takes the case for review, there is no stay of the commission's demolition order. Tex. Loc. Gov't Code § 54.039(e). In 1993, the State amended the statute to eliminate the district court's authority to grant a restraining order or injunction against a demolition order.[7] Acts 1993, 73rd Leg., chap. 836, § 7 (eff. Sept. 1, 1993) (codified at Tex. Loc. Gov't Code § 54.039). A district court suit for a restraining order or an injunction against the demolition order does not state a valid claim. The writ of certiorari is the only available relief. *Nussbaum v. City of Dallas*, 948 S.W.2d 305, 307-308 (Tex. Civ. App. Dallas 1996).

The City's commission, called the Urban Rehabilitation Standards Board, determines whether structures referred to it by City staff are urban nuisances. (App. 3). The URSB can order repairs, vacation and closure, demolition, receivership, and civil penalties of up to $2,000 a day. (App. 3). The City's commission is composed of 30 appointed members and eight alternates. Dallas City Code § 27-6. The ordinance requires the URSB to consist of an architect, a mortgage loan banker, a home builder, a licensed real estate broker, a social or welfare worker, a structural engineer and other members chosen on the

---

[7] The same limitations on judicial review apply to the parallel statute allowing the "municipality" to order and secure demolitions. Tex. Loc. Gov't Code Ann., § 214.0012 (Vernon 1999).

basis of their interest in community affairs. Dallas City Code, § 27-6. Separate panels of the citizen commission hear and decide the individual cases. (App. 3).

The first step in the City's process is the City field inspector's decision to refer a building to the URSB. The inspector fills out a referral form. This unsworn form contains information about the type of structure, vacancy status, tax valuations, location, zoning, code enforcement history, repair cost estimates, demolition cost estimates, condition, and staff recommendation. The staff provides the information in the form to the URSB in the URSB Docket Sheet. R-1, 80, 94. The City does not give either the form or the information in the form to the property owner. R-1, 109-110.

The City presents its case against a property ex parte to the URSB in two ex parte stages before the hearing. First, the City staff presents its evidence to the URSB at an ex parte meeting with City staff, without notice to the property owner, when the URSB panel members, the URSB Administrator, and the City staff meet together in the morning before the afternoon URSB hearings. At this meeting, called a briefing, the URSB Board members first see the City's evidence on the specific cases. Each URSB member receives a docket sheet for each property detailing the history of the case, the information from the referral sheet, and the information deemed relevant by the City staff. R-1, 106-107. At the briefings, the Board members have the opportunity to ask questions of the City staff about the properties involved in the cases that they will hear that day. The Administrator informs the Board of all information she has received via a telephone or written communication on cases that will be heard.

The URSB members and City staff can engage in a full and frank discussion of the specific cases that will be heard. R-1, 107.

The City never provides the property owners with the docket sheets that it gives to the URSB members. R-1, 109-111. The unsworn URSB docket sheets contain much of the information in the code inspector's referral form. The docket sheets contain the same repair cost estimates that are on the referral forms filled out by the inspector before the hearings and do not take into account any repairs that have been made since the referral. R-1, 80, 94-95. When the inspector does not inspect the interior of a building, as was the case with one of Mr. Freeman's buildings, the City calculates the repair estimates by multiplying the square foot measurement of the building by $22.00 per square foot. R-1, 94. The basis for the City's repair estimates are unknown, even to those officials most familiar with the URSB process. R-1, 114; R-5, 7, 78-79.

The second stage of the ex parte presentation occurs after the briefing. The URSB members divide into smaller groups of URSB members and staff persons. These groups make unannounced tours of properties scheduled for hearings that day. R-1, 108. A City staff person conducts the tour. Unless there is a "no trespassing" sign, the panel members and City staff enter the building if possible. About 10% of the time the groups encounter the owner or a neighbor. R-1, 108.

The URSB's decision for each property is based, at least in part, on the impressions gathered during the tour. During the tour and out of the presence of the property

owner, the Board members and the staff typically discuss violations of the properties that they are viewing and that will be heard in the afternoon hearings. They carry with them the entire URSB file for each property and refer to it during the tour. They do not give the property owners notice of this fact-finding mission or the opportunity to be present. No record is made of the discussions during the tours. The City does not provide the URSB file to the property owner at any point during the URSB process and did not provide it to Mr. Freeman. R-1, 108-110.

Although Mr. Freeman appeared at the URSB hearings and rehearings held on the properties, the City never provided him with the specific allegations of substandard and hazardous conditions or the evidence of such conditions that the URSB was considering in the cases against his properties. R-1, 81, 95. The City introduced no documents into evidence at any of the hearings. R-1, 84, 98. The only City evidence at the hearings was photographs of the buildings. R-1, 109. The field inspector, who had inspected the properties, referred them to the URSB, and prepared the repair cost estimates never appeared or testified at any of the hearings. R-1, 111. The City did not call any witness to testify on the condition of the properties. R-1, 81-84, 87-93, 96-98, 101-105. The City never informed Mr. Freeman or Ms. Brown of the ex parte briefings held with City staff concerning the properties or of the ex parte tour taken of the properties by the Board members. Mr. Freeman was present when the board and staff members visited his property on the day of the rehearing of his case. R-1, 107, 109.

Neither the City staff nor the URSB informed Mr. Freeman that he had the burden of proof to show that

repairs were feasible. R-1, 81-84, 96-98. Mr. Freeman did not know the City had cost estimates to repair his property until the middle of the rehearing on one of his buildings when a Board member asked him if he was aware that the City estimated it would cost $84,310 to repair the building. R-1, 89.

At the conclusion of the hearing, the URSB issued a form document entitled "Notice of Demolition." There are no allegations of facts or reasons for the order. The "Notice of Demolition" does not state that the buildings are hazards or nuisances. The document is unsworn. S.R.E. 2, 16. The "Notice of Demolition" issued after the rehearing states that any appeal to district court must be filed within 20 days and that appeal is limited to a hearing under the substantial evidence rule. S.R.E. 5, 19.

The URSB's post-hearing procedure in petitioners' case was the same procedure followed in all cases. There are no documents stating the facts or reasons upon which the URSB bases its hearing decisions. R-1, 85, 99, 113. The official minutes of the hearings do not contain any explanation of the facts or other reasons upon which the URSB bases its decisions. R-2, 14-15, 25-26, 44-45, 50-51. The URSB mails a form captioned "Notice of Demolition Order" which states that an order of demolition has been issued. The stated basis for the order is a boilerplate statement: "Having inspected the property in question and hearing testimony and evidence supplied by the Administrator and staff, after due consideration the Board examined the facts and evidence and found that the structure(s) constitute an urban nuisance and ordered the demolition of ALL improvements to ground level. The notice states that if the owner does not demolish the

property, the City will. The notice provides no facts or specific reasons for the decision. The notice does not state that the buildings are hazards. The document is notarized but the only averment is that the Administrator is the person who signed the notice. S.R.E. 3, 6, 17, 20.

Acting under these procedures, the City's URSB found Mr. Freeman's property to be an "urban nuisance." (App. 5). The City's ordinance does not limit its definition of an "urban nuisance" to hazardous conditions. In addition to hazardous conditions, a property may be an urban nuisance if it is in disrepair and if it "would be substantially offensive and annoying to persons of ordinary sensibilities, tastes and habits living in the community." Dallas City Code § 27-3(23). The City may demolish buildings under this subjective definition of "urban nuisance." R-1, 114-115. The demolition orders do not specify if the City has ordered demolition because of hazardous conditions or because the structure is annoying or offensive. S.R.E. 2, 3, 5, 6. The orders issued for Mr. Freeman's properties do not say whether the buildings are nuisances because of hazardous conditions or because they are annoying. S.R.E. 2, 3, 5, 6.

There are no legal or procedural criteria to guide the URSB in its decision-making other than the urban nuisance ordinance. R-1, 113-115. The ordinance sets forth no criteria or standards for the Board to apply when deciding whether to order demolition or repair of a structure. R-1, 113-114. No verbal or written criteria or standards exist for the Board to apply in determining whether or not to order demolition or repair. R-1, 114. There is nothing in the ordinance that requires the URSB to base its decision solely on the evidence. R-1, 113. There are no

standards for admissibility of evidence at the URSB hearings. R-1, 115. It is impossible for even the City staff to know the standards applied by the URSB in any individual URSB decision. R-1, 115.

There are no written or verbal standards to explain, clarify, or give additional meaning to the nuisance standard that includes the nebulous conditions that "could be substantially offensive and annoying to persons of ordinary sensibility, tastes and habits living in the community." R-1, 114. Each member of the URSB applies this portion of the nuisance ordinance in a manner that is subjective to each person. R-1, 115.

The URSB finds 99% of the properties that come before it to be urban nuisances. The board heard 7,575 cases between Oct. 1, 1990, and Sept. 31, 1996. It found all but 73 to be urban nuisances. R-2, 59. Most of the demolition orders issued by the URSB are against residential structures including single family homes. *See, e.g., Thomas v. City of Dallas,* 175 F.3d 358 (5th Cir. 1999) (City URSB demolition of single family home without notice to the homeowner); *James v. City of Dallas,* 2000 U.S. Dist. LEXIS 4633 (N.D. Tex. 2000) (class certification of homeowners with repairable single family homes demolished by the City URSB); *Burns v. City of Dallas,* 1997 U.S. Dist. LEXIS 16666 (N.D. Tex. 1997) (City URSB demolition of a single family house in violation of Fourth and Fourteenth Amendments); *Swann v. City of Dallas,* 922 F.Supp. 1184 (N.D. Tex. 1996) (unconstitutional demolition of a residential apartment building by the URSB). Of the 2,180 structures demolished by the City between 1990 and 1995, 1,902 were residential. R-2, 59.

On April 23, 1996, Mr. Freeman and Ms. Brown sued the City in federal district court under 42 U.S.C. § 1983, alleging that the City seized and demolished their buildings in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution. (App. 7). Both parties moved for summary judgment. (App. 84). The district court held that the City violated the Fourth Amendment by seizing and destroying the buildings without judicial process or a warrant. (App. 84, 88). The district court found no violation of the Fourteenth Amendment right to due process. (App. 85, 88-89). The district court then submitted the issue of damages for the City's violation of the Fourth Amendment to the jury. The jury awarded $20,000 in damages for demolition of plaintiffs' buildings in violation of the Fourth Amendment to the U.S. Constitution. (App. 85). The district court entered the Final Judgment on August 13, 1997, reflecting the decision of the court with respect to the summary judgment issues and the jury verdict. (App. 84-85).

The City appealed the district court's final judgment concerning the Fourth Amendment and award of damages. Mr. Freeman and Ms. Brown cross-appealed the district court's final judgment regarding the issue of due process. (App. 62).

The Fifth Circuit panel affirmed the district court's holdings on August 18, 1999. (App. 56-57). A panel majority agreed that the City violated the Fourth Amendment by failing to get a warrant or other judicial authorization

before entry and destruction of plaintiffs' properties.[8] (App. 56-65). A panel majority affirmed the district court holding that the City did not violate the Fourteenth Amendment guarantee of due process in this case.[9] (App. 65-69).

The Fifth Circuit granted the City's petition for rehearing en banc to reconsider the Fourth Amendment ruling. *Freeman v. City of Dallas*, 200 F.3d 884 (5th Cir. 2000).

The Fifth Circuit issued the en banc opinion on February 22, 2001.[10] (App. 1-55). In an opinion by Judge Jones, the en banc court reversed the panel opinion concerning the Fourth Amendment. (App 1-25). Four judges dissented from this holding regarding the Fourth Amendment. (App. 25-50). The en banc court also reinstated the panel opinion that there had been no violation of the Fourteenth Amendment, and Judge Dennis dissented from this holding. (App. 4, 50-55).

The Fifth Circuit en banc opinion held that a warrant is unnecessary when a municipality seizes property that has been declared a nuisance by an established police

---

[8] Judge Dennis and Judge Benavides formed the panel majority for the Fourth Amendment holding. (App. 56-65). Judge Garza dissented from the majority opinion regarding the issue of the Fourth Amendment. (App. 69-79).

[9] A separate panel majority of Judge Garza and Judge Benavides held that there had been no violation of due process under the Fourteenth Amendment. (App. 65-69). Judge Dennis dissented from this holding concerning due process. (App. 79-83).

[10] The opinion was revised on March 5, 2001. (App. 1).

power procedure. (App. 2). The en banc majority found that the reasonableness test was met in this case by the City's adherence to its ordinances and procedures as a prelude to ordering the landowners to abate their nuisance structures. (App. 23-24).

Four judges dissented from the en banc majority opinion on the issue of the Fourth Amendment. (App. 25-50). The dissent on the Fourth Amendment issue argued that the majority opinion resurrected the rule in *Frank v. Maryland,* 359 U.S. 360 (1959), which was overruled by the Supreme Court in *Camara v. Mun. Court of San Francisco,* 387 U.S. 523 (1967) and *See v. Seattle,* 387 U.S. 541 (1967). (App. 34-35).

REASONS FOR GRANTING THE PETITION

Fourth Amendment issue

1. The decision of the United States Court of Appeals for the Fifth Circuit in this case conflicts with the decisions of other United States Courts of Appeals on the important Fourth Amendment issue of whether a warrant or other judicial process is necessary before a City may send a work crew onto private property to seize and destroy private property that a non-judicial, administrative hearing process has declared a nuisance.

The Fifth Circuit's result and reasoning in support of the result directly contradict the result and the reasoning of the United States Court of Appeals for the Ninth Circuit in *Conner v. City of Santa Ana,* 897 F.2d 1487 (9th

Cir. 1990), *cert. denied*, 498 U.S. 816 (1990). The Fifth Circuit recognizes the conflict with *Conner*. (App. 20).[11]

The Fifth Circuit decision used a process-based balancing test to justify the warrantless entry and seizure in this case. "The ultimate test of reasonableness is fulfilled in this case by the City's adherence to its ordinances and procedures as a prelude to ordering the landowners to abate their nuisance structures." (App. 23-24, 24 n.17). The Fifth Circuit cited *G.M. Leasing v. United States*, 429 U.S. 338, 341, 342 n.5 (1977), in support of its decision that the administrative hearing process provided the basis for finding the entry and seizure to be reasonable under the Fourth Amendment. (App. 19). The Ninth Circuit rejected the argument that the administrative hearings provided to the owner of the premises before the entry and seizure made the actions proper under the Fourth Amendment. The Ninth Circuit rejected the argument because of the lack of any U.S. Supreme Court precedent creating a "process" exception to the warrant requirement citing *Michigan v. Tyler*, 436 U.S. 499 (1978). The Ninth Circuit interpreted *G.M. Leasing Corp.* as support for expressly rejecting the process-based balancing test and held that a warrantless entry and seizure to abate a City defined nuisance violated the Fourth Amendment. *Conner*, 897 F.2d at 1491.

---

[11] The Fifth Circuit's previous rule was consistent with *Conner*. In *Price v. City of Junction*, 711 F.2d 582, 592 (5th Cir. 1983), the court of appeals held that a municipal ordinance authorizing entry into private property and seizure of junk motor vehicles after an administrative hearing had to be interpreted as requiring a judicial warrant in order to be constitutional under the Fourth Amendment.

The Ninth Circuit followed the precedent set in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and related cases and rejected the argument that *Camara* applied only to searches. *Conner*, 897 F.2d at 1490. The Fifth Circuit avoided the *Camara* precedent by interpreting it as applying only to administrative searches, not seizures. (App. 16-18).

The Fifth Circuit's decision directly contradicts the reasoning of the United States Court of Appeals for the Eighth Circuit in *Hroch v. City of Omaha*, 4 F.3d 693, 697 (8th Cir. 1993). The Eighth Circuit held, in part, that the entry onto private property and the seizure, through demolition, of an apartment building did not violate the Fourth Amendment because there had been prior judicial oversight of the proposed demolition. The Fifth Circuit's reasonableness test explicitly rejected any need for prior judicial oversight. (App. 13).

The Fifth Circuit's decision directly contradicts the Sixth Circuit's application of *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992) and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), to hold that the code enforcement seizure of an apartment building without prior judicial oversight and absent exigent circumstances, violated both the Fourth Amendment and the due process requirement. "In this case, it was sufficiently clear at the time of the eviction that the Flatfords were entitled to pre-eviction judicial oversight in the absence of emergency circumstances." *Flatford v. City of Monroe*, 17 F.3d 162, 170 (6th Cir. 1994). The Fifth Circuit rejected the need for prior judicial involvement under either the Fourth Amendment or the due process requirement. (App. 13).

The Fourth Amendment issue arises in these cases because of the drastic change in procedures for municipal seizures of substandard buildings worked by federal urban renewal programs, state statutes and local ordinances. Before the 1950s, cities regulated the condition of residential and other buildings through fire codes or other general ordinances. Note, "Municipal Housing Codes," 69 Harv. L. R. 1115, 1116 n.8 (1956). Absent emergencies, municipalities were restricted to the use of judicial process in order to obtain the right to enter private property and seize buildings by demolition. *Crossman v. City of Galveston*, 247 S.W. 810, 813 (Tex. 1923) (cases collected); *Rowland v. State of Florida, ex rel. Martin*, 129 Fla. 662, 176 So. 545 (1937); Dillon, *Commentaries on the Law of Municipal Corporations*, Vol. II, pages 1044-1048 (1911); 39 Am. Jur. Nuisances §§ 77, 117, 183-193 (1942).

The judicial process requirement for municipal demolition cases was a specific application of the general law of nuisance abatement. *Crossman*, 247 S.W. at 813; Mandelker, "Housing Codes, Building Demolition, and Just Compensation: A Rationale For The Exercise of Public Powers Over Slum Housing," 67 Mich. L. R. 635, 639-640 (1969). As a general principle, government action to abate nuisances required a judicial determination before abatement in order to comply with due process. Exigent circumstances or matters of trifling value were exceptions to the due process requirement of a prior judicial determination. Even then, the owner of the property could bring a subsequent suit for damages in which the government would have the burden of proving both nuisance and the appropriateness of the destruction of the property as a remedy. *Lawton v. Steele*, 153 U.S. 133,

140-141 (1894). The courts applied these principles to municipal abatement of hazardous, nuisance buildings. *Crossman*, 247 S.W. at 815, *citing Lawton v. Steele*, 153 U.S. 133 (1894).

Federal urban renewal legislation and funding encouraged cities to begin adopting modern housing codes establishing minimum standards and often providing for administrative determinations and demolition orders. Note, "Municipal Housing Codes," 69 Harv. L. R. at 1116; Note, "Enforcement of Municipal Housing Codes," 78 Harv. L. R. 801, 803-804 (1965); Mandelker, "Housing Codes, Building Demolition, and Just Compensation: A Rationale For The Exercise of Public Powers Over Slum Housing," 67 Mich. L. R. 635, 636-637, 639-640 (1969). Texas, and other states, have now passed statutes specifically allowing municipalities to use administrative processes instead of the judicial process. Annotation: Validity and Construction of Statute or Ordinance Providing for Repair or Destruction of Residential Building by Public Authorities at Owner's Expense, 43 A.L.R. 3d 916 (2000).

The change from judicial abatement to administrative seizures raises the Fourth Amendment seizure issues for the first time. Under the common law, any such non-exigent seizures were pursuant to judicial process. Mandelker, 67 Mich. L. R. at 636-640. The judicial process, in the form of a civil case judgment ordering the demolition of a building, provided the assurance that a neutral magistrate had reviewed the proposed entry and seizure and had determined that the invasion of privacy and property was justified by the law. *Soldal*, 506 U.S. at 71. The removal of the judicial supervision in favor of the non-

judicial, administrative process, creates the need for the judicial warrant or other process under the Fourth Amendment. The issue of the content of the Fourth Amendment's application to these administrative demolition processes affects state and municipal code enforcement proceedings throughout the nation.

Governments at all levels continue to abate other forms of alleged nuisances only through the judicial process. Government entry onto private property in order to seize real or personal property under civil or criminal forfeiture statutes and nuisance abatement proceedings continues to be carried out through prior judicial process. Spector, "Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home," 31 Conn. L. Rev. 547, 560-561, 564-565 (1999). The Ninth Circuit precedent does not lessen the need for judicial process or serve as precedent for administrative seizures without judicial process before such seizures. *Conner*, 897 F.2d at 1491. The application of the Fifth Circuit precedent would substantially increase the non-judicially supervised power of the federal, state, and local governments to enter and seize private property in a wide range of non-criminal matters. Given the obvious police power interest in such matters as eradicating crime and abating nuisance conditions of any kind, governments following the Fifth Circuit need only appoint an administrative board or provide other non-judicial process that can issue, and enforce, orders to enter and seize private property without any judicial process. This would be a significant expansion of the government's power and a substantial limitation of the rights of property owners.

For example, the judicial padlocking of the home and assessment of a fine for suspected drug activities in a home as a nuisance in *State v. Anthony*, 647 N.E. 2d 1368 (Ohio 1995) could be done by a citizen board using administrative process without infringing either the Fourth Amendment or the Due Process Clause under the Fifth Circuit rationale. (App. 24). A citizen board using non-arbitrary proceedings could order the seizure and sale of an apartment building for suspected drug use without infringing either constitutional process. Under current standards, a judicial process is required. *City of Milwaukee v. Arrieh*, 565 N.W.2d 291 (Wis. Ct. App. 1997), *review denied*, 569 N.W.2d 589, *cert. denied*, 522 U.S. 1092 (1998). If these nuisance abatement proceedings are delegated to an administrative process, the *Conner* rule would require at least a judicial warrant.

2. The Fifth Circuit's decision, unlike the Ninth Circuit's *Conner* decision, is a significant departure from the controlling U.S. Supreme Court precedents set in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967), *See v. City of Seattle*, 387 U.S. 541 (1967), and *Soldal v. Cook County*, 506 U.S. 56 (1992).

Camara held there is one governing principle for the determination of whether an entry onto private property for a search or seizure is unreasonable.

> "Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonably unless it has been authorized by a valid search warrant.' " Id. 357 at 528-529.

See, applying the standards adopted in *Camara* held:

> "Likewise, we see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in Camara, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." *See*, 387 U.S. at 543.

The Fifth Circuit rejected this precedent by claiming that this Court has "expressed an overarching test of reasonableness that is antagonistic to an inflexible warrant requirement." (App. 13). The Fifth Circuit opinion cites no case for the proposition of antagonism to an inflexible warrant requirement before entering private property. There is no such authority and there is no such inflexible warrant requirement. There is the general presumption referred to in *Camara* that, absent special circumstances, a warrantless entry into private property and subsequent seizure of private property is unreasonable. *Camara*, 357 U.S. at 528-529.

For example, this Court just recently analyzed a temporary seizure by preventing a person from entering his mobile home while police sought a warrant to search the

premises. The Court held the seizure was reasonable under the special needs because of exigent circumstances exception to the proposition that the Fourth Amendment usually requires a warrant before such a seizure would be reasonable. One reason supporting the warrantless, temporary seizure was that it was less intrusive than a warrantless entry into the home. *Illinois v. McArthur*, 531 U.S. 326 (2001).

The case cited by the Fifth Circuit in support of its position that the presumptive unreasonableness of a warrantless entry into private or commercial premises has been abandoned by this Court does not express any antagonism to a warrant requirement in such cases. The drug testing in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) was not approved under a new textual analysis of the Fourth Amendment but rather as an example of the "special needs" exception to the warrant requirement where such a requirement would unduly interfere with school administration. *Id.* at 653.

The Fifth Circuit's decision adopted a new formula for the balancing of private and public interests in the determination of the Fourth Amendment's requirements. The new formula does not weigh the specific interest in entering without a warrant but rather weighs the privacy interest against the general police power goals of the underlying statutory scheme. (App. 19-20). *Camara* and *See* require that the individual's interest be weighed against the government's interest in proceeding without a warrant, not just against the public interest served by the program. *Camara* and *See* specifically reject the use of the general good purpose of the regulatory scheme as the determining factor in the balance.

> The final justification suggested for warrantless administrative searches is that the public interest demands such a rule: it is vigorously argued that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures. Of course, in applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration. But we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. . . . In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part on whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *Camara*, 387 U.S. at 533.

Warrants are a necessary and tolerable limitation on the right to enter upon and inspect commercial premises. *See*, 387 U.S. at 544.

The Fifth Circuit never mentions, much less weighs, whether the burden of obtaining a warrant would affect the government purpose behind the demolition. The Fifth Circuit considers only the general purpose behind the housing code and the need to enforce the codes through

demolition in appropriate cases. (App. 20-21). This is the same argument rejected in *Camara*. (App. 26-28, dissent).

The Fifth Circuit rejected the reasonableness of a warrant requirement because a judicial warrant under *Camara* can be issued ex parte on the basis of the administrative record without pre- or post-warrant notifications of the City's intended actions. Thus, the warrant would be less protective than existing judicial review in state court. (App. 23). This Court rejected this same argument in *Camara* as unduly discounting the purpose behind the warrant machinery contemplated by the Fourth Amendment. That purpose is not to substitute for a due process hearing but to inform the property owner that a neutral magistrate has reviewed the matter and determined the entry is justified under the regulatory scheme, the limits of the entry and subsequent actions are proper and that the person or persons presenting themselves for entry are in fact authorized to do so. *Camara*, 387 U.S. at 532.

It is correct that a judicial warrant to enter and demolish petitioners' property would have issued on an ex parte basis. But all warrants issue on an ex parte basis. All warrant procedures lack the procedural protections of a criminal or civil trial process. *Cf.* Fed. R. Crim. P. 4(a), (b); Fed. R. Crim P. 41.[12] The truism that the Fourth

---

[12] Rule 4. Arrest Warrant or Summons Upon Complaint. (a) Issuance. If it appears from the complaint or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. . . . (b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.

Amendment warrant process does not provide due process under the Fifth Amendment is not an argument against enforcement of the Fourth Amendment. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 51-53 (1993).

Soldal v. Cook County, 506 U.S. 56, 69 (1992) rejected the argument that the Fourth Amendment did not apply to property interests. The Fifth Circuit followed *Soldal* to the extent of recognizing that the City's entry onto petitioners' property and demolition of their buildings was a seizure under the Fourth Amendment. (App. 8-9). The Fifth Circuit departed from *Soldal* by considering only petitioners' privacy interests in its reasonableness determination. There is no discussion of the weight of the property interests at stake. In addition to the invasion of petitioners' privacy interests by entering the premises with demolition equipment and ordering petitioner Freeman off his own premises, the work crew destroyed petitioners' property, two small apartment buildings. R-8, 62-70. The destruction led to the assessment of $15,610 in costs plus interest against petitioners and the filing of liens on the land for these costs. R-1, 117-118. This was a draconian invasion of plaintiffs' property rights. The failure to balance this invasion of privacy and property interests against the slight inconvenience of obtaining a

---

Rule 41. Search and Seizure: (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government. . . . (c) Issuance and Contents. (1) Warrant Upon Affidavit. . . . The finding of probable cause may be based upon hearsay evidence in whole or in part.

seizure warrant violates this Court's precedent set in *Camara, See,* and *Soldal.* (App. 25-44).

Due Process issues

3. The Fifth Circuit decision that the requirements of due process have been met by the City's non-judicial hearing procedure has the effect of eliminating substantial common-law and traditional protections afforded property owners faced with municipal demolition of their buildings. The decision directly conflicts with the decision of this Court in *Honda Motor Co. v. Oberg,* 512 U.S. 415, 430 (1994) that such a derogation of common law protections is presumptively a violation of due process unless the state can show it has provided a constitutionally adequate substitute procedure. The question of the derogation of the common law protections is important because of the widespread use of statutory procedures to eliminate the common law protection afforded property owners in most states. Mandelker, 67 Mich. L. R. at 636-640.

Honda held that statutory abrogation of a well-established common law requirement for judicial review as a protection against arbitrary deprivations of property raises a presumption that the procedures violate the Due Process Clause. 512 U.S. at 430. Traditional practice provides one guideline for constitutional due process. When the statutes remove such traditional procedures that would have provided protection against arbitrary deprivations of property, this Court has not hesitated to find the new proceedings violate due process. Id. The Fifth Circuit, without discussion of *Honda,* dismissed the traditional due process requirement of judicial process in the municipal

abatement of nuisance buildings as a "jurisprudential artifact, interesting but not controlling." (App. 13).

The Fifth Circuit's unequivocal rejection of the proposition that due process requires a judicial determination before the City can seize real property through the administrative code enforcement demolition process is also in direct conflict with two state courts of last resort, the Texas Supreme Court and the Georgia Supreme Court.

The controlling precedent of the Texas Supreme Court is *Crossman*, 247 S.W. at 810.[13] *Crossman* held that a judicial determination must precede a municipal demolition of an allegedly substandard building on several grounds. The constitutional requirement of due process was one ground for the decision. The Texas Supreme Court reasoned that given the interests at stake, real property ownership, a judicial determination of the facts of the existence of a nuisance and the appropriateness of demolition as a remedy for a nuisance was necessary for due process. *Id.* at 812, 813.

The controlling precedent of the Georgia Supreme Court is *Shaffer v. City of Atlanta*, 154 S.E.2d 241, 243 (Ga. 1967). The court succinctly held that the municipal order demolishing the property without a judicial determination was unconstitutional. "If the City desires him to demolish the property without giving him the right to correct any and all deficiencies found in a judicial hearing

---

[13] *Crossman* was followed in *City of Texarkana v. Reagan*, 247 S.W. 816 (Tex. 1923); *City of Houston v. Lurie*, 224 S.W.2d 871 (Tex. 1949); *Manchester Terminal v. Texas Marine Transportation*, 781 S.W.2d 646, 650 (Tex. Civ. App. Houston 1st District 1990); *Hart v. City of Dallas*, 565 S.W.2d 373 (Tex. Civ. App. Dallas 1978).

of whether or not a nuisance exists under Code § 72-40, then let the property be condemned and pay him for it, but not through indirect means prevent him from abating an alleged nuisance before a trial thereon."

Petitioners are not arguing that administrative or other quasi-judicial processes cannot provide due process in many situations. Modern due process law has long abandoned any support for such a position. *Morgan v. U.S.*, 304 U.S. 1, 32, 36 (1938). Modern due process law does require that the administrative process to be substituted for a judicial process must comport with the full, open, and fair hearing standards that are at the heart of the judicial process. *Id.* at 36. The details of the process that is due are determined by the *Mathews v. Eldridge*, 424 U.S. 319, 332-349 (1975) balancing test. But given the overriding importance of property rights in our system, government seizures of property are given the highest weight in the due process calculus. For example, an interim seizure of real property under forfeiture statutes requires both a Fourth Amendment warrant and a pre-deprivation due process hearing. *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993). The prejudgement seizure of real property through attachment proceedings requires a pre-deprivation judicial determination. *Connecticut v. Doehr*, 501 U.S. 1, 11-12 (1991). The Texas and Georgia Supreme Courts have weighed the interests at stake in the municipal demolition of substandard properties. These courts determined that the private interest at stake, ownership and the incidents of ownership of real property, demanded nothing less than full judicial process as a matter of due process. The Fifth Circuit did no such balancing but rejected the right to judicial process as an outmoded, historic relic. App. 13.

The City of Dallas has chosen to adopt and implement an administrative process that is far from the full, open, and fair hearing standards that are at the heart of the judicial process. The City staff presents its case to the URSB on an ex parte basis, before the hearing. R-1, 111. Neither the City staff nor the URSB disclose the documents or other evidence considered by the URSB to the property owner. R-1, 109-111. Neither the pre-hearing notice nor the post-decision order provide any facts about the alleged substandard, hazardous, or annoying conditions. R-1, 85, 99, 113. These procedures violate basic due process rights. *Simmons v. U.S.*, 348 U.S. 397, 404 (1963). The process does not provide the full and fair hearing that would be a constitutionally adequate substitute for the judicial process *Morgan*, 304 U.S. at 32, 36. The Fifth Circuit failed to follow this Court's ruling in *Honda*, 512 U.S. at 430 by finding that the administrative process was constitutional.

CONCLUSION

The petition for the grant of the writ of certiorari should be granted.

Respectfully submitted,

MICHAEL M. DANIEL
Counsel of Record
LAURA B. BESHARA
Attorneys for Petitioners
MICHAEL M. DANIEL, P.C.
3301 Elm St.
Dallas, TX 75226
(214) 939-9230
(214) 741-3596 fax

REVISED – March 5, 2001

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10907

CHARLES FREEMAN and ROSALYN BROWN,

Plaintiffs-Appellees-Cross-Appellants,

v.

CITY OF DALLAS,
Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Northern District of Texas

February 22, 2001

Before JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

The City of Dallas served notices on the owners of two vacant, deteriorated apartment houses, warning them to repair or demolish the structures. The owners fought the order according to City procedures but lost. After the City tore down the condemned buildings, the owners filed suit in federal court alleging violations of the Fourth Amendment and the Due Process Clause. A divided panel of this court held that although the City procedures complied with due process, the City must also obtain a pre-demolition warrant of some sort in order to

---

* Chief Judge King did not participate in this decision.

satisfy the Fourth Amendment. This court, sitting en banc, disagrees with the panel majority's interpretation of the Fourth Amendment and denies relief to the property owners. A warrant is unnecessary when a municipality seizes property that has been declared a nuisance by means of established police power procedures.

I.

Between December 1992 and April 1993, Rosalyn Brown acquired two vacant, eight-unit apartment buildings in Dallas, Texas located at 2621 and 2611 Meyers Street. Brown paid $10.00 for the first building and $1.00 for the second, which had suffered fire damage prior to purchase. On August 11, 1994, Brown transferred a one percent undivided interest in both buildings to her brother, Charles Freeman. The buildings remained vacant during the entire period of plaintiffs' ownership.

Brown intended to rent the apartment units after making repairs. To this end, she asked Freeman to be the general contractor in charge of renovating the apartments. Freeman was neither a registered engineer or architect, nor did he possess a general contractor's license or trade license from the State of Texas. No construction company or crew worked for him.

In April and July of 1993, inspectors from the Dallas Department of Housing and Neighborhood Services (the "Department") cited the plaintiffs' two apartment buildings for non-compliance with the City's Minimum Urban Rehabilitation Standards Code (the "Code"). According to the Department's inspectors, the buildings together needed nearly $200,000 in repairs to comply with the

Code. When the Code violations were not corrected, the Department referred the matter to the Urban Rehabilitation Standards Board ("URSB") and recommended demolition.

The URSB was established by the City of Dallas to determine whether property condition reports filed by city inspectors identify violations of the City's building codes. The URSB comprises thirty private citizen members (and eight alternates) who are appointed by the Dallas City Council. The URSB may determine, after a hearing, whether a given structure is an "urban nuisance" and take various remedial measures. The URSB is authorized by city ordinance to order repairs, receivership, the closing and vacating of buildings, demolition, and civil penalties of up to two thousand dollars a day against property owners who fail to repair or demolish a structure after the board has issued a valid determination and remedial order. Dallas, Tex., Code ch. 27, art. II, § 27-8.

The URSB functions through hearing panels composed of members of the URSB. The Dallas City Code establishes the procedure to be used by the panels. At a hearing, "an owner, lessor, occupant, or lienholder may present witnesses in his own behalf and is entitled to cross-examine any witnesses appearing against him." Dallas, Tex., Code ch. 27, art. II, § 27-9(c). The decision of the hearing panel is final except that rehearings may be granted in certain instances. The code also gives an affected property owner an absolute right to appeal the panel decision to state district court. Dallas, Tex., Code ch. 27, art. II, § 27-9(e). Under state law, the court considers whether the landowner's substantial rights have

been prejudiced because the URSB decision violates constitutional or statutory law; exceeds URSB's authority; is based on unlawful procedure or any other error of law; is unsupported by substantial evidence; or is arbitrary or capricious or an abuse of discretion. TEXAS GOV'T CODE § 2001.174(2).

After receiving the Department's reports on plaintiffs' properties, the URSB conducted a title search and mailed a notice of hearing on each of the properties to the owner of record.[1] The notice announced that the URSB might order demolition to remedy the Code offenses. It further stated that the property owner would "be given an opportunity to present evidence and witnesses if so desired."

In preparation for the hearings, Department staffers briefed the panel of URSB members assigned to decide the fate of the Meyers Street properties. They provided the panel members with information on the properties, including repair cost estimates, and accompanied some of them on a tour of the premises.

Freeman appeared at the hearings, identifying himself as the "attorney-in-fact for Brown" and as an owner

---

[1] Freeman did not get notice because he had no interest in either property at this time. Brown received a notice on 2621 Meyers Street, the property of which she was the owner of record. Brown did not receive notice on the 2611 Meyers Street property because, although she had purchased the property by this date, she had not yet filed a warranty deed. Instead, the notice on 2611 Meyers Street was sent to the owner of record, Robert Burkhead.

of 2611 and 2621 Meyers Street. The panel looked at pictures of the structures, questioned Freeman about his plans for repair, and asked whether he had the funds for repair. Freeman testified that he lacked funds at present and asked for more time to make repairs. Expressing doubt about Freeman's ownership and his ability to finance repairs, the panel unanimously voted to demolish each apartment building as an urban nuisance.[2]

Following the hearing, Freeman signed notices of demolition for both apartment buildings. He then asked for and received a rehearing from the URSB. Two panel members visited the properties before the rehearings.

---

[2] The Code defines an "urban nuisance" as the following:

> [A] premises or structure that:
>
> (A) is reasonably dangerous to the physical health or safety of an occupant or other person; or
>
> (B) because of violations of [the Code] . . . , its state of disrepair is such that it could reasonably cause injury, damage, harm, or inconvenience to a considerable portion of the community in the use and enjoyment of property, materially interfering with the proper use or comfort and enjoyment of surrounding property, taking into consideration the nature and use of the properties in the area and the character of the community in which they are situated, which condition would be substantially offensive and annoying to persons of ordinary sensibilities, tastes, and habits living in the community.

Dallas, Tex., Code ch. 27, art. I, § 27-3(23).

The Code goes on to prescribe with specificity the minimum structural, health and utility standards whose breach may result in the declaration of an urban nuisance. Dallas, Tex., Code ch. 27, Art. III, § 27-11.

They examined the exterior of the apartment building at 2611 Meyers Street. At 2621 Meyers Street, they ran into Freeman. He showed them repairs he had made inside that property, and they told him to bring pictures of these repairs to the rehearings.

At the rehearing, the Department showed pictures of the apartment buildings' exteriors. In response, Freeman testified that he thought he could acquire most of the repair materials at little or no cost. He further stated that he hoped to finance repairs through a loan from the City; he had received a commitment from relatives in the construction business to help him make repairs if he received a City loan.

Freeman also submitted pictures of one unit in the 2621 Meyers Street building that he had repaired, and he presented a list of repair materials that he had already collected. He further testified that he could renovate each unit at 2621 Meyers Street for $2000. Though panel members reacted skeptically and reminded him of the Department's repair cost estimates, Freeman did not inquire about the basis for these estimates nor did he ask to question the Department officials responsible for them.

The panel again voted to demolish plaintiffs' buildings. The vote was unanimous on the 2611 Meyers Street property and was split five to two on the 2621 Meyers Street property. Freeman received a notice of demolition for each property at the end of the rehearing, and he signed them. The notice advised that the panel's decision could be appealed within twenty days to state district

court for review. Freeman and Brown did not appeal the URSB decision to state district court.[3]

When Brown and Freeman failed to demolish the buildings within thirty days, the City hired a contractor to do the work. The two vacant structures were demolished in late December 1994, and the costs of the demolition were assessed against Freeman and Brown in the total amount of about $16,000.

A year and a half later, Freeman and Brown filed suit against the City of Dallas under 42 U.S.C. § 1983. They alleged that the demolition of their apartment buildings without first obtaining a judicial warrant constituted an unreasonable seizure in violation of the Fourth Amendment. They also alleged that the URSB's procedure for condemning and demolishing their apartment buildings and for imposing liens on the remaining realty denied them procedural due process in violation of the Fifth and Fourteenth Amendments.

---

[3] The URSB also sent notice of the order to demolish the building at 2611 Meyers Street to Freeman and notice of the order to demolish the building at 2621 Meyers Street to Freeman and Brown. The notices stated, in part:

> If you do not demolish the structure(s) within the time above indicated [30 days], the city will arrange to have this work done and the expense of that demolition performed under contract with the city will constitute a lien on the real property on which the structure(s) were located, and that lien will run with the land.

These notices were sent to the same addresses at which Brown and Freeman had received mail about earlier hearings, but they were returned as "Unclaimed."

Freeman and Brown moved for summary judgment on the Fourth Amendment claim while the City moved for summary judgment on all claims. The district court granted the plaintiffs' motion on the Fourth Amendment claim and granted the City's motion on the Due Process claims. Following a one-day trial on damages for the Fourth Amendment violation, the district court accepted the jury's verdict and entered final judgment against the City of Dallas in the amount of $20,000 plus interest.

A divided panel of this Court affirmed the district court's summary judgment for the property owners with respect to the Fourth Amendment claim, while also affirming the rejection of the plaintiffs' Due Process claims.[4] *See Freeman v. City of Dallas*, 186 F.3d 601 (5th Cir. 1999), *reh'g en banc granted*, 200 F.3d 884 (5th Cir. 1999). We granted rehearing en banc to reconsider the Fourth Amendment ruling.

II. DISCUSSION

The panel majority reasoned toward a violation of the Fourth Amendment in three steps. First, the demolition of the Freemans' apartment houses was a "seizure" for Fourth Amendment purposes. Second, the seizure had to be preceded by a warrant. Third, a warrantless seizure, even if it occurred following constitutionally adequate local condemnation procedures, is unreasonable and therefore unconstitutional. While we agree that the City

---

[4] This court reinstates the panel opinion concerning the Due Process claims.

seized the Freemans' real property for demolition,[5] we do not accede to the panel majority's inflexible warrant requirement in this context or its supplanting of the Fourth Amendment reasonableness inquiry with such a requirement. The text of the Fourth Amendment conspicuously fails to require a warrant for every government search or seizure. And the controlling caselaw emphasizes reasonableness, a balancing of governmental versus private interests, as the touchstone of the Fourth Amendment.

Since the relevant facts are undisputed, summary judgment was granted on the merits as a matter of law, *see* Fed. R. Civ. P. 56(c). We review the district court's decision de novo. *See United States v. Johnson*, 160 F.3d 1061, 1063 (5th Cir. 1998).

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, *Ker v. California*, 374 U.S. 23, 30, 83 S. Ct. 1623, 1628 (1963), declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

---

[5] "Seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property, *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656 (1984), and a "seizure" may occur in both civil and criminal contexts. There can be no question that the city's actions against the Freeman's apartment buildings constituted a "seizure". *See Soldal v. Cook County, Ill.*, 506 U.S. 56, 62 & n.7, 113 S.Ct. 538, 544 & n.7 (1992), (holding that the forcible removal of a mobile home, leaving the owners dispossessed, constituted a "seizure" under the Fourth Amendment).

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This provision contains two separate and independent clauses. The first proscribes "unreasonable searches and seizures," and the second prescribes the narrow conditions under which a warrant may issue. Nothing in the text suggests that warrants are required for every search or seizure, nor is the existence of a warrant a sine qua non for a reasonable search or seizure. While the text plainly mandates reasonableness in the seizure, it does not instruct whether a warrant is necessary to ensure the reasonableness of the City's demolition order.

To determine the necessity of a warrant here, we might consider common law at the time the Fourth Amendment was adopted, *see Wyoming v. Houghton*, 526 U.S. 295, 299, 119 S. Ct. 1297, 1300 (1999), but, contrary to plaintiffs' assertions, the quest would be fruitless. Confusing the demands of due process with the warrant clause, plaintiffs' historical argument observes that, at common law, apart from cases where a nuisance posing an imminent danger could be summarily abated by self-help, structures were ordinarily determined to be nuisances in criminal or civil abatement actions. Because the courts at the time of the framing of the Constitution oversaw nuisance law, plaintiffs assume that they must continue constitutionally to play a role under the aegis of the Warrant Clause. There are two serious flaws in this argument. First, none of the cases cited by the plaintiffs

deals with warrants.[6] Instead, cases from the nineteenth century involved judicial review to determine whether structures or activities were in fact injurious under state and local police power.[7] Other cases evaluated nuisance determinations by the standards of procedural and substantive due process.[8] Whatever these cases may imply

---

[6] The federal government lacked authority over nuisances at and after the time of the framing, and the Fourth Amendment was not first applied to the states until 1961. *Mapp v. Ohio*, 367 U.S. 643, 646-47, 81 S.Ct. 1684, 1686-87 (1961).

[7] *See Yates v. Milwaukee*, 77 U.S. 497, 505, 19 L.Ed. 984 (1870) ("It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself."); *Hennessy v. St. Paul*, 37 F. 565, 566 (C.C. Minn.1889) ("[U]nless a nuisance, as defined by the common law or by statute, exists, the act of the common council cannot make it one by a mere resolution. Such a doctrine might place the property of the people, no matter what in fact might be its real condition and character, at the disposal of the common council, without compensation."); *Underwood v. Green*, 42 N.Y. 140 (N.Y. 1870); J.E. Macy, Annotation, *Constitutional Rights of Owner as Against Destruction of Building by Public Authorities*, 14 A.L.R.2d 73, *8 (1950) ("[N]either at common law nor under such express power can it, by its mere declaration that specified property is a nuisance, make it one when in fact it is not.").

[8] *See, e.g., Lawton v. Steele*, 152 U.S. 133, 141, 14 S.Ct. 499, 502 (1894) ("If the property were of great value . . . it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law."); *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 301 (1887) ("The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a

about the historical view of the reasonableness of particular nuisance decisions, they say nothing about employing the Warrant Clause to review those decisions.

Second, the plaintiffs theorize that because nuisance determinations historically involved judicial procedures, such determinations can only be "reasonable" today if they are subject to plenary court review. This theory is fundamentally at odds with the development of governmental administrative agencies. Characteristically, agency decisions are deferred to by the courts. Plaintiffs apparently seek, however, to broaden courts' involvement in nuisance decision-making contrary both to the deferential standard of judicial review of administrative decisions and to the broad standards for issuance of warrants. None of the decisions produced by plaintiffs justifies reverting to the 18th century judicial role in nuisance abatement. This court's comment in rejecting, over

---

particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law."); *Our House v. The State*, 4 Greene 172, 1853 WL 221, *2 (Iowa 1853) (holding that a law declaring "dram shops" to be public nuisances, authorizing their abatement, and establishing certain procedures for notice and a hearing "does not deprive a person of his property without due process of law"). The notion of substantive due process survives in challenges to municipal zoning and nuisance decisions, as this court has recently held. *John Corp. v. City of Houston*, 214 F.3d 573, 581-86 (5th Cir. 2000) (allegation that city deprived landowners of property by allowing demolition under unconstitutionally vague ordinance states cognizable substantive due process claim).

twenty-five years ago, a similar argument for reinstituting common law judicial review of nuisance determinations bears repeating:

> [F]or the purposes of marking the limits of federal constitutional due process the common law of nuisance must be considered a jurisprudential artifact, interesting but not controlling.

Traylor v. City of Amarillo, 492 F.2d 1156, 1159 (5th Cir. 1974) (Goldberg, J.). Even more emphatically, the common law of nuisance affords no basis for creating a per se judicial warrant requirement that is redundant of procedural and substantive safeguards inherent in modern administrative law and explicit municipal nuisance ordinances.

Where history yields no firm answer, a search or seizure must be evaluated under traditional standards of reasonableness. *Wyoming*, 526 U.S. at 300, 119 S. Ct. at 1300. There is no Supreme Court caselaw directly on point. Still, the Court has expressed an overarching test of reasonableness that is antagonistic to an inflexible warrant requirement. Thus, the reasonableness standard is one that reflects a " 'careful balancing of governmental and private interests.' " *Soldal*, 506 U.S. at 71, 113 S. Ct. at 549, (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S. Ct. 733, 742 (1985)). More recently, the Court reiterated, "as the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is reasonableness." *Vernonia School Dist. 47J v.*

Acton, 515 U.S. 646, 652, 115 S. Ct. 2386, 2390 (1995).[9] Vernonia also clearly distinguishes between the reasonableness of government searches and the warrant requirement:

> Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant. Warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the reasonableness of all government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either.[10]

---

[9] *See also City of Indianapolis v. Edmond*, 121 S.Ct. 447, 4451 (2000) ("The Fourth Amendment requires that searches and seizures be reasonable."); *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 421 (1996) ("the touchstone of the Fourth Amendment is reasonableness") (internal quotations omitted); *Whren v. United States*, 517 U.S. 806, 817, 116 S.Ct. 1769, 1776 (1996) ("It is of course true that in principle every Fourth Amendment case, since it turns upon a reasonableness determination, involves a balancing of all relevant factors.") (quotations omitted); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 930 (1967) ("[R]easonableness is still the ultimate standard [under the Fourth Amendment]."); *Carroll v. United States*, 267 U.S. 132, 147, 45 S.Ct. 280, 283, 69 L.Ed. 543 (1925) ("The Fourth Amendment does not denounce all searches and seizures, but only such as are unreasonable.").

[10] The Court goes on in the same paragraph of *Vernonia* to state that:

> A search unsupported by probable cause can be constitutional, we have said, 'when special needs, beyond the normal need for law enforcement, make

Vernonia, 515 U.S. at 653, 115 S. Ct. at 2390-91 (emphasis added) (citations omitted). Under these decisions, the fundamental inquiry, which we will address in detail later, is the reasonableness of the City's seizure.

The property owners contend, however, and this court's panel opinion held that, the seizure of their property was per se unreasonable unless the City obtained a warrant to enforce its demolition order. In support of this position, plaintiffs and the panel majority rely on a handful of cases. Their reliance is misplaced.

In companion cases, the Court did extend a warrant requirement of a sort to administrative inspections of private homes and business properties, the purpose of which was to verify compliance with municipal health and safety codes. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727 (1967); *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737 (1967). Evidence of code violations uncovered by the warrantless searches might lead to fines or other penalties. Balancing the need for searches against the property owners' privacy, the Court concluded that warrants were necessary to check the unfettered discretion code enforcement officers had in the field. A property owner had "no way of knowing

---

> the warrant and probable-cause requirement impracticable'.

515 U.S. at 653, 115 S.Ct. at 2391. By its terms, and by the Court's further explanation, the "special needs" caveat tends to expand rather than narrow exceptions to the warrant requirement. Further, "special needs" are relevant to relaxation of the probable-cause basis for a government search for evidence. Here, however, there is probable cause for the City's seizure.

whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization." *Camara*, 387 U.S. at 532. Only with the protection of an administrative warrant would property owners avoid capricious or overbroad searches.

Camara and *See* are distinguishable from this case. First, since searches to gather evidence of regulatory noncompliance invade citizens' privacy "without particularized suspicion of misconduct,"[11] they need only satisfy standards of administrative reasonableness. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320, 98 S. Ct. 1816, 1824 (1978) (requiring only administrative reasonableness for regulatory searches); *Griffin v. Wisconsin*, 483 U.S. 868, 877 n.4, 107 S. Ct. 3164, 3170 n.4 (1987) (requiring only administrative reasonableness for regulatory searches). Here, the evidence of municipal code violations had already been obtained by means unchallenged by the landowners, and the administrative adjudication of noncompliance has occurred. The landowners availed themselves of two hearings resulting in a decision of the seven-member panel of the URSB, and after these proceedings, there remained a possibility of state court judicial review. What is sought by these plaintiffs is not protection against an unregulated search for evidence of wrongdoing, but additional protection to forestall the result of already-determined wrongdoing.

---

[11] *City of Indianapolis v. Edmond*, ___ U.S. ___, 121 S.Ct. 447, 451 (2000).

Second, the URSB, unlike the field code inspectors in *Camara* and *See*, could not operate with unbridled discretion. The municipal code specifies grounds on which a building may be determined to be a public nuisance.[12] The property owners' right to defend the case against their apartment buildings was procedurally secure. Only by impugning the institutional integrity of the URSB can one arrive at the conclusion, unsupported in this record, that it exercised standardless discretion and either arbitrarily enforced the municipal code or failed to consider the property owners' evidence. The nature of the URSB's adjudicative function[13] imposes more numerous and more transparent constraints on the URSB than did the evidence-gathering function performed by field officers randomly inspecting private buildings in *Camara* and *See*.

Third, it is hard to understand what protection the *Camara*-approved administrative warrant would provide for these plaintiffs. *Camara* relaxed the probable cause standard for issuance of such warrants, requiring only a more general determination that "legislative or administrative standards for conducting an area inspection" be reasonable. *Camara*, 387 U.S at 538, 87 S. Ct. at 1735-36. *Camara*-style administrative search warrants need not be issued by judicial officers. *See Griffin v. Wisconsin*, 483 U.S. 868, 877 and n.5, 107 S. Ct. 3164, 3170 and n.5 (1987).

---

[12] See *supra* note 2.

[13] The Texas Local Government Code describes the agencies like the URSB as exercising "Quasi Judicial Enforcement of Health and Safety ordinances." Subchapter C, Texas Local Gov't. Code, Tit. 2, Subtitle D, Ch. 54 (§§ 54.032-54.042).

Plaintiffs also admit that administrative search warrants may be issued ex parte. While the Court's standards may meaningfully constrain officials who enter private property for inspection purposes, they are obviously ill-suited to regulate completed administrative condemnation proceedings. If a warrant of some type is to be imposed in lieu of state judicial review, it must be on terms different from the *Camara* warrants in order to assist these landowners. But if the terms are different, then a different justification is necessary.

Camara and *See* thus doubly fail to support the plaintiffs' argument. Those cases imply either that seizure of the apartment buildings was preceded by reasonable, rigorous procedures that protected the property owners' rights, or they mandate an ex parte, possibly nonjudicial administrative warrant shorn of probable cause, which does the property owners no good. While useful in their sphere, these cases fail to support a warrant following a completed nuisance abatement procedure.

The landowners have also cited *Soldal* in support of their warrant argument, but *Soldal* is not even a warrant case. The only issue decided by *Soldal* was whether the nonjudicial eviction-by-relocation of the tenants' mobile home, with sheriffs' deputies assisting, constituted a seizure within the Fourth Amendment. The Court refused to consider whether the seizure was constitutionally reasonable, as it stated:

> Whether the [4th] Amendment was in fact violated is, of course, a different question that requires determining if the seizure was

> reasonable. That inquiry entails the weighing of various factors and is not before us.

Soldal, 506 U.S. at 62, 113 S. Ct. at 543.

In the final case offered by plaintiffs, the Supreme Court held that the IRS must obtain a warrant to search private premises to locate property that may be seized to enforce a valid federal tax lien. *GM Leasing Corp. v. United States*, 429 U.S. 338, 97 S. Ct. 619 (1977). More significantly for present purposes, the Court distinguished a search for unidentified nonexempt property from a seizure, and it rejected requiring a warrant for seizures of the taxpayer's vehicles from property where the seizures "did not involve any invasion of privacy." 429 U.S. at 351, 97 S. Ct. at 628. Similarly in this case, the plaintiffs retained little or no reasonable expectation of privacy in their dilapidated, uninhabited rental properties after the URSB had entered orders declaring them an urban nuisance, and the owners had failed to abate the code violations.

GM Leasing also states that where seizures are sustainable under the Due Process Clause, constitutional analysis of the same acts under the Fourth Amendment "is similar and yields a like result." *Id.* at n.18. Texas's administrative condemnation procedures have withstood due process challenge. *Traylor v. City of Amarillo*. 492 F.2d 1156 (5th Cir. 1974). Far from supporting the plaintiffs, *GM Leasing* thus forecasts, even if it does not compel, that a balancing of the public and private interests at stake will favor the public interest in nuisance abatement after the conclusion of adequate administrative proceedings.

Not only does plaintiffs' theory lack support in Supreme Court caselaw, but it enjoys only minority support among the federal circuits. The Eighth and Sixth Circuits have found no Fourth Amendment bar to warrantless condemnation and eviction proceedings, where satisfactory administrative procedures preceded them. *Samuels v. Meriwether*, 94 F.3d 1163 (8th Cir. 1996); *Hroch v. City of Omaha*, 4 F.3d 693 (8th Cir. 1993); *Flatford v. City of Monroe*, 17 F.3d 162, 170 (6th Cir. 1994). On the other hand, a divided panel of the Ninth Circuit held that a warrant was necessary before city officials could enter private property to seize previously-condemned automobiles. *Conner v. City of Santa Ana*, 897 F.2d 1487, 1495 (9th Cir. 1990). We disagree with *Conner* for reasons stated in Judge Trott's dissent, 897 F.2d at 1494-98, and based on our evaluation of Fourth Amendment reasonableness.

Although the City did not have to obtain a warrant to effectuate a valid seizure and demolition of the nuisance structures, the fundamental Fourth Amendment question of reasonableness remains, a question decided by balancing the public and private interests at stake.

As the Supreme Court has acknowledged, "the public interest demands that all dangerous conditions be prevented or abated." *Camara*, 387 U.S. at 537, 87 S. Ct. 1735. Regulation of nuisance properties is at the heart of the

municipal police power.[14] It is eminently reasonable for a city to prescribe minimum property maintenance standards to protect the public and to maintain adjacent land values. Nevertheless, a city may not arbitrarily enter abatement orders or declare the existence of nuisances with no underlying standards. Texas law forbids such actions,[15] and the City's ordinance exemplifies the state statutes' criteria. Contrary to the landowners' argument, Dallas's minimum standards for property owners assure structural soundness, public health and safety and human habitability. The Dallas ordinance is not concerned with aesthetic or non-functional values. The ordinance falls well within the City's police power and thus within a sphere that courts have traditionally been reluctant to invade.

---

[14] While the Supreme Court has not specifically defined the scope of the police power, it has reaffirmed the "classic statement" of the rule:

> 'To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature. . . . '

Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95, 82 S.Ct. 987, 990 (1962) (citations omitted).

[15] *See generally*, Tex. Loc. Govt. Code, Tit. 2, Subtitle D, ch. 54.

Prescription of standards necessitates their enforcement, and it is also reasonable that nuisance abatement be one of the enforcement mechanisms available to the City. While abatement is permissible, however, the City ordinance affords property owners the opportunity to contest the determination of non-compliance, to repair their property, or to seek other remedies. Dallas's procedures include reasonable notice to and time limits upon landowners' actions, multiple hearing possibilities, flexible remedies, and judicial review in state court under typical criteria for review of administrative actions.[16] That these standards comport with due process suggests the Fourth Amendment reasonableness of the URSB's final remedial orders.

With regard to the landowners' interests, the Fourth Amendment protects only those expectations of privacy that society recognizes as "legitimate". *New Jersey v. T.L.O.*, 469 U.S.325, 338, 105 S. Ct. 733, 741 (1984). "What expectations are legitimate varies, of course, with context . . . [and] . . . may depend upon the individual's legal relationship with the State". *Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2391. Because the Dallas nuisance standards are straightforward and the administrative procedure is adequate, these property owners' expectation of privacy in the nuisance structures after the remedial orders became final was severely diminished. As vacant commercial

---

[16] Indeed, the grounds for state court judicial review are nearly identical to those standards employed historically by courts in reviewing nuisance decisions, *i.e.* the decisions on which plaintiffs seek to build the edifice of their warrant requirement.

properties, the structures were not subject to the same degree of privacy protection as non-business property. *New York v. Burger*, 482 U.S. 691, 700, 107 S. Ct. 2636, 2642 (1987); *O'Connor v. Ortega*, 480 U.S. 709, 725, 107 S. Ct. 1492, 1501 (1987). Further, nearly a year had passed since the plaintiffs were informed of their structures' non-compliance. While they did defend themselves before the URSB, they made no significant progress in remedying violations whose total repair cost was nearly $200,000. Whereas the landowners in *Soldal* were the victims of non-judicial eviction without prior notice, these plaintiffs had ample notice and a full panoply of administrative remedies. Finally, since the rent properties were uninhabited, the demolition, unlike the eviction carried out in *Soldal*, did not invade anyone's personal privacy.

Requiring an administrative warrant of some sort after the URSB proceedings would not have enhanced the landowners' security or privacy. A *Camara* warrant could be sought *ex parte*; it could be obtained solely on the basis of the completed administrative record; no requirements of pre- or post-warrant notification of the City's intended actions were necessary. If the purpose of a warrant is to obtain some neutral review of the URSB orders, this procedure is less protective of the landowners than existing judicial review in state court.

The ultimate test of reasonableness is fulfilled in this case by the City's adherence to its ordinances and procedures as a prelude to ordering the landowners to abate

their nuisance structures.[17] The Supreme Court originally extended an administrative warrant requirement to civil investigations because "the basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara*, 387 U.S. at 528, 87 S. Ct. at 1730 (emphasis added); *see also Marshall*, 436 U.S. at 312, 98 S. Ct. at 1820. Whatever else the City's enforcement of its municipal habitation code might be, it is sufficiently hedged about by published standards, quasi-judicial administrative proceedings, and flexible remedies that it is not arbitrary. In the context of reviewing civil administrative and regulatory enforcement of laws enacted pursuant to the traditional police power, Fourth Amendment reasonableness means non-arbitrariness. The Fourth Amendment was not violated here.[18]

---

[17] In reaching this conclusion, we do not ignore *Soldal*'s mandate that a particular government action may implicate more than one constitutional provision. *Soldal*, 506 U.S. at 70, 113 S.Ct. at 538. A particular nuisance determination might be reviewable under the Takings Clause or Substantive Due Process as well as the Fourth Amendment or Procedural Due Process standards. *John Corp. v. City of Houston*, 214 F.3d 573 (5th Cir. 2000). But the Fourth Amendment reasonableness of a seizure and demolition of nuisance property will ordinarily be established when the substantive and procedural safeguards inherent in state and municipal property standards ordinances have been fulfilled. *See Samuels*, 94 F.3d at 1168.

[18] *Cf. Soldal*, 506 U.S. at 71, 113 S.Ct. at 549 ("Assuming . . . that the [evicting] officers were acting pursuant to a court order . . . a showing of unreasonableness would be a laborious task indeed."). Likewise, we believe a showing of unreasonableness in the face of the City's adherence to its ordinance is a "laborious task indeed."

CONCLUSION

For all these reasons, we conclude that the seizure and demolition of the plaintiffs' apartment buildings, after those structures were condemned according to City ordinance and state law, were reasonable under the Fourth Amendment. The judgment against the City is **REVERSED**.

DENNIS, Circuit Judge, with whom WIENER, BENAVIDES and STEWART, Circuit Judges, join in Part I only, dissenting:

The en banc majority reaches the conclusion that, while binding Supreme Court precedent interpreting the Fourth Amendment's proscription of unreasonable searches would clearly require the URSB to secure a warrant from a neutral judicial officer to conduct an inspection of the two apartment buildings in the absence of consent or exigent circumstances, the Fourth Amendment's proscription of unreasonable seizures, as illumined by the same and additional Supreme Court precedent, does not require the URSB to secure such a warrant before demolishing the same apartment buildings. Unable to square this anomalous result with the language of the Fourth Amendment or Supreme Court jurisprudence, I dissent.

I. FOURTH AMENDMENT

A. *Camara, Soldal,* and *Freeman*

The *Freeman* panel majority holding that the URSB violated the owners' Fourth Amendment rights correctly

follows the Supreme Court's Fourth Amendment decisions in *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992), and *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967).

In *Frank v. Maryland*, 359 U.S. 360 (1959) (5-4 decision), *overruled by Camara*, 387 U.S. at 523 (1967), the Court upheld, by a five-to-four vote, a state court conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect his premises without a search warrant. In his majority opinion, Justice Frankfurter suggested that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior, and that a warrant is not required for an administrative inspection because the "power [to inspect dwellings to maintain community health] would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts." *Id.* at 372.

In *Camara*, 387 U.S. at 534, the Court expressly overruled *Frank v. Maryland*, holding that under the Fourth Amendment a lessee of the ground floor of an apartment building had a constitutional right to insist that San Francisco Department of Public Health Housing Code inspectors obtain a judicial warrant to inspect his premises, and that he could not be constitutionally convicted for refusal to consent to the inspection. The Dallas URSB advances the same "public necessity" arguments in support of warrantless, non-exigent seizures and destruction of private property that the Court firmly rejected as insufficient to uphold San Francisco's warrantless, non-exigent housing code inspections in *Camara*. San Francisco argued that (i) the ordinances authorizing inspections are hedged with safeguards and the inspector's decision to enter must

comply with the standard of reasonableness even if he may enter without a warrant, *id.* at 531; (ii) the warrant process could not function effectively in this field, *id.* at 532; and (iii) the public interest demands warrantless administrative searches as the only effective means of enforcing minimum fire, housing, and sanitation standards, *id.* at 533. As Justice White, writing for the *Camara* majority, explained:

> In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. . . . We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.
>
> . . . It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable warrant requirement. Thus, we do not find the public need argument dispositive.

In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. State of Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections. *Id.* at 532-34.

Thus, *Camara* held that, in the absence of consent or an emergency situation, the Fourth Amendment requires that a warrant be issued by a judicial officer before a government entity may inspect private property to enforce minimum health and safety standards for the prevention of "fires and epidemics" or "unsightly conditions adversely affect[ing] the economic values of neighboring structures." *Id.* at 534, 535, & 539-40.

In the second part of its opinion, the Court in *Camara* discussed the type of "probable cause" required for a warrant to enter and inspect private property. The Court concluded that " 'a health official need [not] show the same kind of proof to a magistrate as one must who would search for the fruits or instrumentalities of crime.' " *Id.* at 538 (quoting *Frank*, 359 U.S. at 383) (Douglas, J., dissenting)). Instead, the satisfaction of reasonable legislative or administrative standards for inspections may be used to show "probable cause," such as the passage of time, the nature of the buildings, the condition of the entire area, or other factors not necessarily dependent upon specific knowledge of the condition of a particular dwelling. *See id.* "[R]easonableness is

still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted warrant." *Id.* at 539.[1]

In *Soldal*, 506 U.S. at 61, the Court held that the presence of deputy sheriffs for the purpose of forestalling the Soldal family's resistance while a trailer park operator seized and removed the family's house trailer from the park, without a warrant, eviction judgment, other judicial order, or exigent circumstances, clearly implicated the Soldals' Fourth Amendment rights. In an unanimous opinion by Justice White, the Court rejected the Seventh Circuit's narrow reading of the Amendment, which the Circuit construed as safeguarding only privacy and liberty interests while leaving unprotected possessory interests when neither privacy nor liberty is at stake. *Id.* at 62. The Court held that "[t]he Amendment protects the people from unreasonable searches and seizures of 'their persons, houses, papers, and effects.' This language surely cuts against the novel holding below, and our cases unmistakably hold that the Amendment protects property as well as privacy." *Id.* The Court pointed to its decisions explaining that a "seizure" of property occurs when " 'there is some meaningful interference with an individual's possessory interests in that property,' " *id.* at

---

[1] In *See v. City of Seattle*, 387 U.S. 541 (1967), decided the same day as *Camara*, the Court held that the Fourth Amendment forbids warrantless inspections of commercial structures as well as private residences. "[T]he basic component of a reasonable search under the Fourth Amendment – that it not be enforced without a suitable warrant procedure – is applicable in this context, as in others, to business as well as to residential premises." *Id.* at 546.

61 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)), and concluded: "We fail to see how being unceremoniously dispossessed of one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment." *Id.*

The Court in *Soldal* stopped short of deciding whether the seizure was a violation of the Fourth Amendment because the Seventh Circuit had failed to reach that issue due to its incorrect decision that there had been no "seizure." A careful reading of the Court's unanimous *Soldal* opinion, however, strongly suggests that a violation had occurred under Fourth Amendment law because (1) the dispossession of the Soldals of their trailer home was a "seizure" because it was a "meaningful interference" with their possessory interest, *id.* at 61, not an insignificant interference associated with a "garden-variety" landlord-tenant or commercial dispute, *id.* at 72; (2) the deputies were acting under color of state law in assisting in the seizure, *id.* at 60 n.6 & 71; (3) the officers were not acting pursuant to a warrant or other judicial order, *id.* at 58 and 71; (4) there was no probable cause to associate the seized property with criminal activity, *id.* at 68; and (5) there was no emergency situation because the seizure could have "properly awaited the state court's judgment," *id.* at 71.

The Court noted that the Seventh Circuit had correctly acknowledged that, under the Supreme Court's precedents, the Fourth Amendment's protection applies in the civil as well as the criminal context. *Id.* at 67. But the Supreme Court concluded that the Circuit had erred when it seemingly construed the Amendment to protect

only against seizures that are the outcome of a search. *Id.* at 68. "[O]ur cases are to the contrary and hold that seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." Id. The Supreme Court explained that the Seventh Circuit's construction of the Fourth Amendment to protect only against seizures that are the outcome of a search is at odds with the Supreme Court's plain- view cases in which seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place. *Id.* at 68 (citing *United States v. Jacobsen*, 466 U.S. at 120-25; *United States v. Place*, 462 U.S. 696, 706-07 (1983); *Cardwell v. Lewis*, 417 U.S. 583, 588-89 (1974)). "For the plain-view cases clearly state that, notwithstanding the absence of any interference with privacy, seizures of effects that are not authorized by warrant are reasonable only because there is probable cause to associate the property with criminal activity." *Id.* at 69.

Significantly, the Court also made it clear that the Fourth Amendment protections are triggered when a government entity seizes a building to enforce compliance with housing regulations, stating:

> In our view, the reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question whether the Amendment applies. What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police,

> or on a whim, for no reason at all. As we have observed on more than one occasion, it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

Id. at 69 (quoting *Camara*, 387 U.S. at 530).[2]

Finally, the Court in *Soldal* characterized as "exaggerated" the fears of the Seventh Circuit and Cook County that applying the Fourth Amendment in this context will federalize areas of law traditionally the concern of the states, such as routine repossessions, negligent actions of public employees that interfere with individuals' right to enjoy their homes, and the like. *Id.* at 71. The Court's opinion expressly or impliedly indicates several reasons for this conclusion: (1) activities by state actors such as repossessions or attachments that involve entry into the home, intrusion on individuals' privacy, or interference with their liberty, have long been recognized as implicating Fourth Amendment rights; (2) if the state action does not involve privacy or liberty interests," 'reasonableness is still the ultimate standard[. If a valid public interest

---

[2] *See also United States v. Jacobsen*, 466 U.S. at 125 n.28 (relied on prominently in *Soldal*, in which the Court issued the following caveat: "Of course, where more substantial invasions [than taking a trace of powder for a chemical test] of constitutionally protected interests are involved, a warrantless search or seizure is unreasonable in the absence of exigent circumstances." (citing *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980); *Dunaway v. New York*, 442 U.S. 200 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977))).

justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.]' " *Id.* (quoting *Camara*, 387 U.S. at 539) (bracketed material added. *See Camara*, 387 U.S. at 539). Thus, generally speaking, a state officer will not violate the Fourth Amendment when his acts under color of law are (a) pursuant to a warrant or other judicial or court order, *see id.*; (b) in emergency situations, *see Camara*, 387 U.S. at 539; or (c) insignificant interferences associated with "garden variety" commercial or landlord-tenant disputes, *Soldal*, 506 U.S. at 72, rather than "some meaningful interference with an individual's possessory interests in . . . property." *Id.* at 61 (quoting *Jacobsen*, 466 U.S. at 113). For these reasons, it is evident that, if the Court in *Soldal* had been required to reach the issue, it would have concluded that the seizure in which the Soldals were "unceremoniously dispossessed" of their trailer home, without a warrant, eviction judgment, or other judicial order, and in the absence of any emergency, was a violation of the Soldals' Fourth Amendment rights.[3]

Correspondingly, the Dallas URSB's seizure and destruction of the private property owners' edifices were "meaningful interferences" with their possessory interests in their buildings, not a "garden-variety" commercial or landlord-tenant controversy. On the contrary, it was a

---

[3] On remand, in light of the Supreme Court's decision, the district court concluded that the defendants were not entitled to qualified immunity. "Because we determine that plaintiffs' allegations support an inference that the defendants were aware of circumstances making their actions unreasonable, and hence, illegal, we refuse to dismiss the action." *Soldal v. County of Cook*, No. 88C7654, 1993 WL 199050, *5 n.1 (N.D. Ill. June 10, 1993).

seizure and destruction of private property that was at least as invasive as the removal of a house trailer from a trailer park or the seizure of a building "undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all." *Soldal*, 506 U.S. at 69. Consequently, the administrative seizures and demolitions by the URSB at issue in the present case were significant intrusions upon the interests of private property owners protected by the Fourth Amendment, and such seizures and demolitions by the URSB, a government entity acting under color of state law, not pursuant to a judicial warrant or court order, and not in an emergency situation, are clear violations of the Fourth and Fourteenth Amendments. *See Camara*, 387 U.S. at 534; *Soldal*, 506 U.S. at 66-67.

B. This Court Is Bound By *Camara* and *See*, Not *Frank v. Maryland*

A Federal Court of Appeals is bound by the decisions of the Supreme Court, even if the intermediate appellate judges think that a Supreme Court decision is unsound or in error. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Hutto v. Davis*, 454 U.S. 370, 375 (1982); *Jaffree v. Wallace*, 705 F.2d 1526, 1532-33 (11th Cir. 1983) (citing and quoting *Stell v. Savannah-Chatam County Bd. of Educ.*, 333 F.2d 55, 61 (5th Cir. 1964), *overruled in part on other grounds by United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (1967)); *United States v. Twin City Power Co. of Georgia*, 253 F.2d 197, 205 (5th Cir. 1958); *Marcello v. Ahrens*, 212 F.2d 830, 839 (5th Cir. 1954), aff'd, 349 U.S. 302 (1955). Accordingly, this court must follow *Camara* and *See*, which held that, because of the

Fourth Amendment, administrative entry or invasion of private residential or commercial property, without consent or an emergency situation, may only be compelled within the framework of a suitable judicial warrant procedure.

Nevertheless, the majority concludes that the district court and the panel Fourth Amendment majority were wrong in holding that the URSB violated the building owners' Fourth Amendment rights by seizing and destroying their private property without consent or a warrant and in the absence of exigent circumstances. This conclusion is based on a common theme, (i) that the Fourth Amendment does not require a judicial warrant procedure to protect individuals from meaningful interferences with their possessory interests in private property by governmental entities; (ii) instead, the Amendment only protects such individuals by the deterrent effects of reparations under § 1983 if it is determined ex post facto that private property was seized or destroyed "unreasonably" according to a standard of reasonableness or a balancing of private and public interests. In effect, the majority seems to think that the warrant requirements of *Camara* and *See* have been overruled and *Frank v. Maryland*'s warrantless standard of reasonableness has been resurrected in their place.

Similarly, the majority's reasoning erroneously suggests that Justice White's references in part III of *Soldal* to *Camara* and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), somehow signal approval of warrantless seizures of private property, without consent or exigent circumstances, by officers acting under color of law, so long as the

officers comply with a standard of reasonableness reflecting a careful balancing of public and private interests. The passage containing those references, part of Justice White's explanation that *Soldal*'s interpretation of the Fourth Amendment involves little or no risk of federalizing state law, states:

> More significantly, "reasonableness is still the ultimate standard" under the Fourth Amendment, *Camara, supra*, 387 U.S., at 539, 87 S.Ct., at 1736, which means that numerous seizures of this type will survive constitutional scrutiny. As is true in other circumstances, the reasonableness determination will reflect a "careful balancing of governmental and private interests." *T.L.O., supra*, 469 U.S., at 341, 105 S.Ct., at 742. Assuming, for example, that the officers were acting pursuant to a court order, as in *Specht v. Jensen*, 832 F.2d 1516 (CA10 1987), or *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), and as often would be the case, a showing of unreasonableness on these facts would be a laborious task indeed. *Cf. Simms v. Slacum*, 3 Cranch 300, 301, 2 L.Ed. 446 (1806). Hence, while there is no guarantee against the filing of frivolous suits, had the ejection in this case properly awaited the state court's judgment it is quite unlikely that the federal court would have been bothered with a § 1983 action alleging a Fourth Amendment violation.

Soldal, 506 U.S. at 71.

A careful reading of the complete passages from which Justice White quoted in the forgoing paragraph shows that he, as the author of *Camara*, *T.L.O.*, and *Soldal*, did not in any of those passages suggest dispensing with

the warrant procedure. To the contrary, he consistently repeated the idea he expressed for the Court in *Camara*, "that a health official need not show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime." *Camara*, 387 U.S. at 538. Later in *Camara*, in the passage partially quoted in *Soldal*, Justice White stated: "The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539. The same day in *See*, he expressed these ideas in a different way:

> The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field.

See, 387 U.S. at 545 (footnote omitted). His full sentence describing the flexible probable cause concept in *T.L.O.*, reads: "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *T.L.O.*, 469 U.S. at 341.

Justice White also wrote for the Supreme Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978), which held that, under the warrant clause of the Fourth Amendment, the Occupational Safety and Health Act (OSHA) is unconstitutional to the extent that it would permit inspections of private businesses by OSHA inspectors without a warrant or its equivalent. He began by reaffirming that "[t]he Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes", *id.* at 311, and that, accordingly, "warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes." *Id.* at 312. Justice White then discussed *Camara* and *See*, and then concluded "that unless some recognized exception to the warrant requirement applies, *See v. City of Seattle* would require a warrant to conduct the inspection sought in this case." *Id.* at 313. Because of the absence of a recognized exception to the warrant requirement – such as pervasively regulated businesses in which entrepreneurs voluntarily choose to subject themselves to the full arsenal of governmental regulation thereby precluding a reasonable expectation of privacy (which is clearly the exception and not the rule) – without a warrant a government inspector "stands in no better position than a member of the public." *Id.* at 313-15.

Most important, in *Marshall*, Justice White expressly rejected the Secretary of Labor's argument that "the enforcement scheme of the Act requires warrantless searches, and that the restrictions on search discretion contained in the Act and in its regulations already protect as much privacy as a warrant would." *Id.* at 315. These are precisely the arguments advanced by the City of

Dallas and accepted by the majority in this case. In fact, as the following passage aptly demonstrates, these arguments take out of context *Soldal*'s quotation from *Camara* ("reasonableness is still the ultimate standard") and attribute to it a meaning explicitly rejected by Justice White:

> The Secretary thereby asserts the actual reasonableness of OSHA searches, whatever the general rule against warrantless searches might be. Because "reasonableness is still the ultimate standard," *Camara v. Municipal Court*, 387 U.S., at 539, 87 S.Ct., at 1736, the Secretary suggests that the Court decide whether a warrant is needed by arriving at a sensible balance between the administrative necessities of OSHA inspections and the incremental protection of privacy of business owners a warrant would afford. He suggests that only a decision exempting OSHA inspections from the warrant clause would give "full recognition to the competing public and private interests here at stake." *Ibid.*
>
> . . . .
>
> We are unconvinced, however, that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective.
>
> . . .

Id. at 315-16.

Moreover, Justice White makes crystal clear that "reasonableness" afforded by the statutory scheme may substitute for probable cause to issue the warrant, but it may not substitute for the warrant itself:

> Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court*, 387 U.S., at 538, 87 S.Ct., at 1736. . . . We doubt that the consumption of enforcement energies in the obtaining of such warrants will exceed manageable proportions.

Id. at 320-21 (footnote omitted) (bracketed text in original).

Finally, Justice White rejected the notion "that the incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed." *Id.* at 322.

> The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is

> pursuant to an administrative plan containing specific neutral criteria.

Id. at 323 (footnote omitted).

Against this background, it is clear that Justice White in the *Soldal* paragraph quoting parts of the *Camara* and *T.L.O.* passages did not impliedly or silently overrule the principal holding of *Camara* that significant administrative intrusions require a warrant procedure, in the absence of consent or an emergency.[4] Read within the context of the passages from *Camara, See, Marshall,* and *T.L.O.*, describing the flexible standard of reasonableness, it is clear that in that *Soldal* paragraph Justice White merely expressed the opinion that it will be difficult to show a Fourth Amendment violation when an officer seizes property pursuant to a court order, if the order was measured and issued according to a reasonable standard based on a careful balancing of public and private interests. This meaning is borne out by the citation in the *Soldal* paragraph calling upon the reader to reference *Simms v. Slacum*, 3 Cranch 300, 301, 7 U.S. 300, 306-07 (1806), in which Chief Justice Marshall stated:

---

[4] In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment protections.

Camara, 387 U.S. at 534.

> The judgments of a court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void; and, therefore, all acts performed under them are valid so far as respects third persons. A sheriff who levies an execution under a judgment fraudulently obtained, is not a trespasser, nor can the person who purchases at a sale under such an execution, be compelled to relinquish the property he has purchased.

7 U.S. at 306-07.

In short, *Camara, See, Marshall, T.L.O.*, and *Soldal* all indicate that under certain circumstances a flexible standard of reasonableness can substitute for the kind of probable cause that must be shown by law enforcement officers to obtain a warrant to search for criminal evidence; they do not support the notion that reasonableness can substitute for the judicial warrant that is required before an administrative search or seizure of private property without consent or an emergency situation.

This court cannot legitimately overrule or disregard *Camara* and *See*, which require a warrant before a municipality can effect a search or seizure of private residential or commercial property without consent or emergency circumstances under health, safety, and building regulations, even if a flexible probable cause or reasonableness standard has been met.

The language upon which the majority relies in arguing that *Camara* and *See* are inapplicable is taken out of context from the "special, beyond normal, law enforcement needs" cases that are inapposite here. The cases the majority cites – *Vernonia Sch. Dist. v. Acton* (suspicionless

random drug testing of high school athletes in a particular exigent factual situation); *Griffin v. Wisconsin* (reasonable grounds search without a warrant of probationer within legal custody under state law pursuant to a state regulation authorizing such warrantless searches); *New Jersey v. T.L.O.* (search of student's purse on suspicion of violation of school rule against smoking) – are those in which the Court has "permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

The Court in those cases clearly limited the "special needs" exception to the warrant requirement to special situations in criminal law enforcement: "A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." *Griffin*, 483 U.S. at 873-74; *see also Chandler v. Miller*, 520 U.S. 305 (1997) (Georgia's requirement that candidates for state office pass drug test did not fit within closely guarded special needs category of constitutionally permissible suspicionless searches); *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853 (5th Cir. 1998) (school board's rules violated Fourth Amendment inasmuch as no special needs exception to requirement of individualized suspicion of wrongdoing applied).

The present case is not a criminal law enforcement case, much less a "special needs, beyond the normal need

for law enforcement" case, and it is certainly not a case in which the warrant requirement is impracticable. The majority's rejection of the warrant requirement in this case makes it difficult to say that it exists at all in the Fifth Circuit, except for few persons whose criminal convictions are reversed because the violation of their Fourth Amendment rights was so flagrant as to amount to harmful, reversible error.

C. This Circuit and Others

In concluding that the URSB violated the owners' Fourth Amendment rights, the *Freeman* panel Fourth Amendment majority decision followed the controlling precedent of this Circuit, and this decision does not conflict with what is the controlling precedents of other circuits.

In *United States v. Paige*, 136 F.3d 1012, 1021 (5th Cir. 1998), this court recognized that "[t]he Supreme Court recently made clear that the protection afforded by the Fourth Amendment extends to an individual's possessory interests in property, even if his expectation of privacy in that property has been completely extinguished." (citing *Soldal*, 506 U.S. at 62-63). This court in *Paige* also observed that "[g]enerally, 'seizures conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions.' " *Id.* at 1022 (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993)). The *Freeman* Fourth Amendment majority applied Paige's teachings from the Supreme Court cases of *United States v. Jacobsen*, 466 U.S.

109, and *United States v. Place*, 462 U.S. 696, to conclude that the URSB seizures do not fall within an exception to the warrant requirement fashioned in those cases because the seizures were not lawful and temporary in their inception, the seizures did not have a de minimis impact on the owners' property interests, and it could not be said that the safeguards of a warrant would have only minimally advanced Fourth Amendment interests. *Freeman v. City of Dallas*, 186 F.3d 601, 606 (5th Cir. 1999).

The *Freeman* Fourth Amendment majority is not inconsistent with the other Circuits' leading cases although it is at odds with an Eighth Circuit case. In *Flatford v. City of Monroe*, 17 F.3d 162, 170 (6th Cir. 1994), the Sixth Circuit held that under the Fourth Amendment the plaintiffs "were entitled to pre-eviction judicial oversight in the absence of emergency circumstances." That court also found that the eviction had been predicated upon exigent circumstances. *Id.* at 170-71. In *Hroch v. City of Omaha*, 4 F.3d 693, 697 (8th Cir. 1993), the Eighth Circuit held that the defendants' actions in implementing the City's condemnation order did not constitute an unreasonable seizure in violation of Hroch's Fourth Amendment rights. The *Hroch* court pointed out that a state court had denied an injunction so that there was judicial oversight of the condemnation process which provided "a constitutionally adequate substitute for a warrant." *Id.* at 696-97 (citing and quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1981)). In *Conner v. City of Santa Ana*, 897 F.2d 1487, 1492 (9th Cir. 1990), the Ninth Circuit held that a search and seizure of the Conners' property to abate a known

nuisance without any judicial authorization was impermissible under the Fourth Amendment. Although *Conner* was decided before *Soldal*, it is consistent with that decision because it relied on *Camara*, and *Soldal* did not change *Camara*; rather, *Soldal* only reaffirmed what had been established before, that the Fourth Amendment protects property as well as privacy and may protect property interests even when neither privacy nor liberty is at stake. *Soldal*, 506 U.S. at 62-71. In *Samuels v. Meriwether*, 94 F.3d 1163, 1167-68 (8th Cir. 1996), however, the Eighth Circuit misread *Soldal* as overruling *Camara* sub silentio and replacing the warrant process required by *Camara* with a reasonableness balancing test. *Soldal* does not express or imply such an intention, however, and it is absurd to attribute to Justice White, the author of both opinions, an intention to overrule *Camara* without saying so, particularly since he cites and quotes *Camara* prominently with approval in *Soldal*.

All of these circuit decisions, except *Samuels v. Meriwether*, are consistent with a correct reading of *Camara*, *See*, and *Soldal* which plainly indicate that, in the context of administrative searches and seizures, compliance with reasonable legislative and administrative standards may serve as probable cause for a warrant, but not as a substitute for the warrant procedure itself; *see Camara*, 387 U.S. at 538, 545-46; *Soldal*, 506 U.S. at 71; although nothing forecloses prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. *See Camara*, 387 U.S. at 539.

D. Other Arguments

A number of rationales are advanced by the majority that have a false appearance of genuineness, but are really only variations on their main theme of contention:

(1) That only self-imposed reasonableness is required of a governmental entity in seizing and razing buildings for urban renewal, and the municipal procedures followed by the URSB assured sufficient reasonableness in this case. This argument is premised upon two faulty propositions: (i) that Fourteenth Amendment due process of law and Fourth Amendment reasonableness analyses are fungible; and (ii) that *Soldal* sub silentio overruled *Camara* and its warrant requirement for administrative searches and seizures, thereby resurrecting *Frank v. Maryland* and its warrantless reasonableness standard. With respect to (i), in *Soldal*, the Supreme Court expressly rejected that proposition, stating that "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged . . . we examine each constitutional provision in turn." 506 U.S. at 70; *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49-50 (1993) (in considering claims that the same government conduct violated both the Fourth Amendment protections against unreasonable seizure and the Fifth Amendment protections of due process of law, the Court stated that it has repeatedly rejected the view that the applicability of one constitutional amendment preempts the guarantees of another). *Flatford*, 17 F.3d at 170-71, does not support the argument either, because it, in effect, merely concludes that both the Fourth Amendment and Due Process standards are relaxed where the

conduct complained of is justified by exigent circumstances. With respect to (ii), as demonstrated earlier, *Soldal*, a unanimous opinion by Justice White, building on and citing with approval his own opinion for the court in *Camara*, cannot reasonably be read to implicitly or silently overrule *Camara*'s core holding that, in the absence of consent or exigent circumstances, administrative searches or seizures of private houses or buildings without a judicial warrant violate the Fourth Amendment, and that *Frank v. Maryland* is expressly overruled.

(2) That the URSB is the functional equivalent of a neutral and detached judicial officer. The fallacy of this contention is self-evident. The URSB is an agency of the City of Dallas charged with the remediation – including the demolition – of structures deemed by it to constitute urban nuisances. The URSB's job is to eliminate unsightly conditions adversely affecting the economic value of neighboring property and the City's tax base. The URSB cannot possibly serve effectively in this executive capacity and act as a neutral and detached magistrate to safeguard the rights of the owners whose buildings it determines should be razed. "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Camara*, 387 U.S. at 529 (citing and quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). This principle applies with equal force to the seizure and destruction of real property by government enforcement agencies such as the URSB, because the decision to seize and destroy private property under these circumstances, like the decision to enter and inspect, "[can]not be the product of unreviewed discretion of the

enforcement officer in the field." *Id.* at 545. Rather, the "warrant machinery contemplated by the Fourth Amendment" so prominently emphasized by Justice White is necessarily administered by a "neutral magistrate." *See Camara*, 387 U.S. at 532; *Marshall*, 436 U.S. at 323.

(3) That the warrant process would overburden the URSB. This argument was rejected firmly by the Supreme Court in *Camara*, *see* 387 U.S. at 532, and again in *Marshall*, 436 U.S. at 321. Moreover, the step of securing a warrant issued by a neutral and detached judicial officer is not difficult or time consuming. The property owner benefits greatly from the safeguarding of his protected interests that can only be provided by a neutral judicial officer's pre-execution approval of the seizure and demolition. In the present case, as is typical, almost a year passed between the notices of noncompliance and the ultimate demolition orders. Had the URSB at the appropriate time during this lengthy period properly obtained a warrant for the seizure and demolition of the owners' buildings, it is almost certain that the federal court would not have been bothered with this § 1983 action alleging a Fourth Amendment violation.

(4) That Texas currently has no procedural mechanism for judicial oversight of public nuisance abatement. However, it appears that such oversight is provided for by Texas legislated law. *See* Tex. Gov't. Code Ann. § § 24.08 (district court may hear and determine any cause cognizable by courts of law or equity), and 24.011 (district court judge may grant all writs necessary to enforce the court's jurisdiction). Moreover, judicial oversight of public nuisance abatement in the context of this case is required by Texas jurisprudence. *See City of*

Houston v. Lurie, 224 S.W.2d 871, 874 (Tex. 1949) ("It has been repeatedly held that the question whether property is a public nuisance and may be condemned as such is a justiciable question to be determined by a court."); *Hart v. City of Dallas*, 565 S.W.2d 373, 379 (Tex.Civ.App.-Tyler 1978, no writ) (whether the URSB or the city council made the determination that the house was a hazard to the health, safety, and welfare of the citizens, "the City would have been without authority to demolish the house in the absence of a judicial determination that the house was a nuisance in fact."). Moreover, even if the Texas courts lacked express statutory or jurisprudential authority to issue warrants for the search or seizure of property, undoubtedly they are endowed with such authority by the Fourth Amendment, the State Constitution, and their inherent judicial powers.

II. DUE PROCESS

The plaintiffs cross-appealed the district court's ruling against their Fifth Amendment claim. I dissent from the en banc majority's decision, affirming summary judgment in favor of the City of Dallas on the due process claim for the same reasons that I dissented from the panel's decision. *See Freeman*, 186 F.3d at 612-14 (Dennis, dissenting).

A governmental seizure of a person's property implicates two explicit textual sources of constitutional protection, the Fourth and Fifth Amendments. *James Daniel Good Real Prop.*, 510 U.S. at 49-50; *Soldal v. Cook County*, 506 U.S. at 61, 70-71. Although the decision in *James Daniel Good Real Property* was based upon the procedural protections

of the Fifth Amendment's Due Process Clause, the similarly worded procedural protections of the Fourteenth Amendment's Due Process Clause apply with equal force to states and municipalities.[5]

The City does not, and could not, dispute that the seizure and destruction of the plaintiffs' real property

---

[5] The Supreme Court has held that the Fourteenth Amendment's Due Process Clause "legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress." *Hibben v. Smith*, 191 U.S. 310, 325 (1903). Of the guarantees of the Fifth Amendment, only the grand jury clause has been held not to be applicable to the states. 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 14.2, at 347-48 (2d ed. 1992) (citing *Hurtado v. California*, 110 U.S. 516 (1884)). The Fifth Amendment prohibitions of compulsory self-incrimination and double jeopardy were made applicable to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Benton v. Maryland*, 395 U.S. 784 (1969), respectively. In addition, although the Fifth Amendment's just compensation provision has not "technically" been incorporated against the states, "the Court has held that the fourteenth amendment due process guarantee provides the same safeguard against a state's taking of property without just compensation." 2 Rotunda & Nowak, *supra*, § 14.2, at 350 (citing *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)). *See also Hurtado v. California*, 110 U.S. 516, 541 (1884) (Harlan, J., dissenting) ("[T]he 5th [amendment] provided that 'no person shall be deprived of life, liberty or property, without due process of law.' This language is similar to that of the clause of the 14th amendment now under examination. That similarity was not accidental, but evinces a purpose to impose upon the States the same restrictions, in respect of proceedings involving life, liberty and property, which had been imposed upon the General Government.").

deprived them of property interests protected by the Fifth and Fourteenth Amendments' Due Process Clauses. The City argues, however, that a hearing before a panel of the City's own Urban Rehabilitation Standards Board afforded the plaintiffs all the process they were due before their property was seized and destroyed. I believe that in the absence of an extraordinary situation, which did not exist in the present case, the Due Process Clauses require that, before a person is deprived of his real property by the government, he must be given notice and an opportunity for a meaningful hearing before a neutral magistrate, and that there must be a judicial determination that the seizure is justified.

Where the government seizes property not to preserve evidence of criminal wrongdoing but to assert ownership and control over the property, its action must also comply with the procedural protections of the Due Process Clauses of the Fifth and Fourteenth Amendments. *James Daniel Good Real Prop.*, 510 U.S. at 50. The Supreme Court's precedents establish the general rule that Due Process requires that, absent an extraordinary situation, a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. *United States v. $8,850*, 461 U.S. 555, 562 n.12 (1983) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971)); *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1974); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Due Process also requires that individuals must receive notice and an opportunity to be heard before the government deprives them of property. *James Daniel Good*

Real Prop., 510 U.S. at 48 (citing *$8,850*, 461 U.S. at 562 n. 12; *Fuentes*, 407 U.S. at 82; *Sniadach*, 395 U.S. at 342 (Harlan, J., concurring); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

In *James Daniel Good Real Property*, the Supreme Court held that, in the absence of exigent circumstances, the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard in an adversary hearing, to ensure the requisite neutrality that must inform governmental decisionmaking, before seizing real property subject to civil forfeiture. 510 U.S. at 48, 53-56. The protection of an adversary hearing before a neutral magistrate is of particular importance where the government has a direct pecuniary interest in the outcome of the proceeding. *Id.* at 55-56. In *James Daniel Good Real Property*, the Supreme Court emphasized that "[t]he constitutional limitations we enforce in this case apply to real property in general, not simply to residences." *Id.* at 61.

Accordingly, the Due Process requirements of notice, a meaningful adversary hearing before a neutral magistrate, and a judicial determination of justification must be afforded to a person before his real property is seized and destroyed in order to abate or rehabilitate an "urban nuisance." In a case such as the present one, there is need for equally rigorous adherence to the principles of Due Process as in civil forfeitures of real property. The City of Dallas has pecuniary interests in the outcome of such proceedings, e.g., justification for federal and state urban renewal grants; enhancement of the municipal tax base by promoting the replacement of old buildings with new

ones. The need for safeguards against arbitrary, capricious, or unreasonable seizures based on subjective standards may be even greater in "urban nuisance" or "urban rehabilitation" cases. Moreover, a post-seizure hearing cannot provide any remedy in such cases because the destroyed property cannot be restored and the best evidence of whether the seizure was justified will have been demolished also. It is not necessary to accomplish the City's legitimate goals of urban rehabilitation that an owner whose real property the City proposes to destroy be deprived of an opportunity for a meaningful pre-seizure adversary hearing before a neutral and impartial judge or magistrate. Requiring the City to postpone seizure and destruction until after such a hearing and judicial determination that the seizure is justified creates no significant administrative burden. And any harm that results from delay is minimal in comparison to the injury occasioned by the erroneous seizure and destruction of real property. *Id.* at 59.

III. CONCLUSION

In summary, *Camara* and *See* require a judicial warrant procedure for the administrative search or seizure of private property, except in consensual or emergency situations. *Soldal* does not overrule or modify *Camara* or *See*; it simply makes clear that the Fourth Amendment protects property as well as privacy and liberty. The *Freeman* Fourth Amendment majority correctly applied *Camara*, *See*, and *Soldal*, and the other circuits' decisions, except for one, are not in conflict with that interpretation. Thus, I would affirm the judgment against the City of Dallas.

Because the process used by the City of Dallas failed to meet the requirements of due process as dictated by the Fifth Amendment, I would also reverse the judgment for the City of Dallas and would grant summary judgment in favor of the plaintiffs on this claim.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10907

Charles Freeman and Rosalyn Brown,

Plaintiffs-Appellees-Cross-Appellants,

VERSUS

City of Dallas,

Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Texas

August 18, 1999

Before EMILIO M. GARZA, BENAVIDES, and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

This case presents the questions of whether the seizure and destruction of the Plaintiffs' vacant apartment buildings by the City of Dallas, as "urban nuisances," based only on the findings and order of a panel of the City's Urban Rehabilitation Standards Board: (1) violated the Due Process Clauses of the Fifth and Fourteenth Amendments because the owners were not given an opportunity for an adversary hearing before a neutral magistrate and a judicial determination prior to the seizure and destruction of their real property; and (2) violated the Fourth Amendment, because the City seized and destroyed the Plaintiffs' property without a warrant issued by a magistrate based on a finding of probable cause.

A majority of this panel holds that the notice and hearings provided by the City satisfied the constitutional Fifth and Fourteenth Amendment's guarantees against deprivation of property without due process of law. A different majority of this panel holds that the Fourth and Fourteenth Amendments were violated when the City seized and destroyed the Plaintiffs' property without a warrant issued by a judicial officer based on probable cause. The district court's judgment reaching the same results is affirmed.

I. FACTS AND PROCEDURAL HISTORY

Charles Freeman and Rosalyn Brown owned two apartment buildings in Dallas, Texas. Ms. Brown bought the building located at 2621 Meyers Street on December 26, 1992, and filed a warranty deed in the Dallas County Deed Records on July 1, 1993. Ms. Brown bought the building located at 2611 Meyers Street on April 11, 1993, and filed a warranty deed on August 3, 1994. Warranty deeds were filed on August 11, 1994, in which Ms. Brown transferred a one percent undivided interest in both buildings to her brother, Charles Freeman. The buildings were vacant when Ms. Brown bought them and remained unoccupied until they were demolished.

The City of Dallas established the Urban Rehabilitation Standards Board (URSB) to determine whether property condition reports by city inspectors constitute violations of the City's building code. The URSB is composed of 30 members (and 8 alternates) who are appointed by the Dallas City Council. The URSB may determine, after a hearing, whether a given structure is an "urban

nuisance" and take various remedial measures. The URSB is authorized by city ordinance to order repairs, receivership, the closing and vacating of buildings, demolition, and civil penalties up to $2,000 a day against property owners who fail to repair or demolish a structure after a valid determination and order has been issued by the URSB. Dallas City Code, ch. 27, art. II, § 27-8.

In April and July of 1993, City code inspectors from the Department of Housing and Neighborhood Services reported to the URSB that the Plaintiffs' two apartment buildings were in violation of the City's building code. According to the inspectors the 2611 Meyers Street building was in need of repairs estimated to cost $84,290.00, and the 2621 Meyers Street building needed repairs costing $108,680.00.

The URSB scheduled hearings to determine whether the buildings were in violation of the city building code and whether remedial steps should be taken. The URSB functions through hearing panels composed of members of the URSB. The Dallas City Code establishes the procedure to be used by the panels. At a hearing "an owner, lessor, occupant, or leinholder may present witnesses in his own behalf and is entitled to cross-examine any witnesses appearing against him." Dallas, Tex., Code ch. 27, art. II, § 27-9(c). The decision of a hearing panel is final except that rehearings may be granted in certain instances. Also, the code authorizes an affected property owner to appeal from the panel decision to the state district court for a "limited hearing under the substantial evidence rule." *Id.* § 27-9(e).

Notice of the URSB panel hearings with respect to the Plaintiffs' two buildings were mailed to the persons listed as owners on the title records. With regard to the building at 2621 Meyers Street, the City sent notices to Rosalyn Brown and K.K. Stanfield (the previous owner) of the panel hearing "To Consider an Order of Repair or Correction of a Potential Urban Nuisance." Ms. Brown signed the return receipt on February 28, 1994. This notice listed all of the possible actions that the URSB could take, including demolition: "If the board orders demolition, closure, vacation or removal, and if it is done by city forces, you will be required to pay for the expenses or a lien will be placed against the property." This notice concluded by stating, "It is important that you attend this hearing or send a representative." With regard to the structure at 2611 Meyers Street, an identical notice was sent to the person listed as the owner on the title, Robert Burkhead. Ms. Brown had purchased the property but had not yet filed her warranty deed. It appears that neither Burkhead nor the Plaintiffs received advance notice of the hearing with respect to the 2611 Meyers Street building, but Mr. Freeman learned that it was also involved when he attended the hearing in response to the notice sent to Ms. Brown concerning the 2621 Meyers Street property.

At the hearing concerning the two apartment buildings on February 28, 1994, Mr. Freeman testified and was questioned by the panel members. The panel looked at pictures of the structures, questioned Mr. Freeman about what plans he had to repair them, and asked whether he had the money or the time to accomplish the tasks. Mr. Freeman testified that he intended to repair the buildings

himself and requested the panel to allow him sufficient time to do so. The panel members voiced their concerns about Mr. Freeman's ability to obtain the repair materials and his ability to renovate them by himself. The panel voted unanimously to demolish both structures.

Following this hearing, Freeman signed two notices of demolition for both apartment buildings. The City then sent out a "Notice of Demolition Order" for each building. As to the 2611 Meyers Street structure, the City sent notices to Freeman and Robert Burkhead. Freeman signed the return receipt on March 11, 1994, but Burkhead's notices were returned "Attempted – Not Known." Notices of a demolition order were sent to Rosalyn Brown and Charles Freeman as to the URSB's action concerning the 2621 Meyers Street building. Freeman signed return receipts of the notices on March 11, 1994. Each notice stated that the owners "may exercise your right to an administrative rehearing and review of this demolition order."

Mr. Freeman asked for and received a rehearing from the URSB on May 23, 1994. At the rehearing, the URSB members questioned Mr. Freeman about the two buildings, whether he had the materials to repair them, and whether any repairs had been made to the buildings since the last hearing. Mr. Freeman stated that had received some donated materials and he submitted pictures of one unit in the 2621 Meyers Street building that he had repaired. Several members of the URSB panel expressed disbelief that Mr. Freeman could renovate the units for $2000 each as he claimed. The URSB panel again voted to demolish both structures – the vote was unanimous as to

the 2611 Meyers Street building, and it was five to two as to the 2621 Meyers Street building.

On the day of the hearing, Mr. Freeman signed the "Notice of Demolition" of both the 2611 and 2621 Meyers Street buildings. Neither Freeman nor Brown appealed the URSB panel decision to the state district court. A notice entitled "Appeal Denied/Demolition" was sent to the owners of each building. Notice of the proposed demolition of 2611 Meyers Street was mailed to Freeman and Burkhead; notice of the proposed demolition for the other building was mailed to Freeman and Brown. Even though the notices for Freeman and Brown were sent to the same addresses at which they had received mail about earlier hearings, all of these were returned as "Unclaimed." No further notice was given to the Plaintiffs before the buildings were demolished in late December 1994. The costs of demolition by the City were assessed against Freeman and Brown in the amounts of $7954.72 for the building at 2611 Meyers Street and $7655.55 for the 2621 Meyers Street property.

On April 23, 1996, Freeman and Brown brought suit against the City of Dallas under 42 U.S.C. § 1983 in federal district court. Freeman and Brown contended that the City violated their rights under the Fourth, Fifth, and Fourteenth Amendments because the City did not provide adequate due process prior to demolishing the apartment buildings, did not obtain a warrant before seizing and destroying Plaintiffs' buildings, and did not provide any due process to the Plaintiffs prior to placing a lien against the property for the costs of demolition.

On cross motions for summary judgment, the trial judge partially granted Plaintiffs' motion, concluding that the City had violated the Fourth and Fourteenth Amendments by seizing and destroying Plaintiffs' buildings without a judicial warrant based on probable cause, and partially granted the City's motion by rejecting the Plaintiffs' Fifth and Fourteenth Amendments' due process claim. The case was submitted to a jury to determine damages under § 1983 for the City's warrantless seizure and destruction of the apartment buildings. The jury awarded $20,000 in damages to Freeman and Brown. The City appealed and the Plaintiffs cross-appealed following entry of this judgment.

II. FOURTH AMENDMENT[1*]

The government's seizure of a person's property implicates the Fourth Amendment, which is "made applicable to the States by the Fourteenth[.]" *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (citing *Ker v. California*, 374 U.S. 23, 30 (1963)).

In this case, the City of Dallas seized and destroyed the buildings owned by the plaintiffs without a warrant. This act undoubtedly constituted a "seizure" because a seizure occurs when " 'there is some meaningful interference with an individual's possessory interests in that property.' " *Soldal*, 506 U.S. at 61 (quoting *United States v.*

---

[1] *Judge Garza does not concur in this part of the opinion and dissents therefrom with reasons.

Jacobsen, 466 U.S. 109, 113 (1984)). The Fourth Amendment's protections extend not only to searches and seizures incident to criminal investigations but also to administrative searches and seizures in the civil context. *Id.* at 67.

The protection afforded by the Fourth Amendment extends to an individual's possessory interests in property, even if his expectation of privacy in that property has been completely extinguished and no search within the meaning of the Amendment has taken place. *Soldal*, 506 U.S. at 62-63, 68; *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *United States v. Paige*, 136 F.3d 1012, 1021 (5th Cir. 1998). Subject only to a few specifically established exceptions not applicable here, seizures conducted outside the judicial process, without prior approval by a judge or magistrate, based on probable cause, are per se unreasonable under the Fourth Amendment. *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993); *Paige*, 136 F.3d at 1021.

The seizures in this case do not fall within an exception to the warrant requirement fashioned by *United States v. Jacobsen*, 466 U.S. 109 (1984), and *United States v. Place*, 462 U.S. 696 (1983), allowing courts to decide after the fact whether a warrantless seizure was constitutionally unreasonable by balancing individual and government interests. Essentially, *Jacobsen* and *Place* hold that (1) a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests by, for example, converting a temporary deprivation of possessory interests into a permanent one; and that (2) to assess the reasonableness of the government conduct, a court must balance the nature and quality of the intrusion

on the individual's Fourth Amendment interests against the importance of the government interests alleged to justify the intrusion. In *Jacobsen*, the Supreme Court applied this test and concluded that the field test destruction/seizure of a trace amount of material which had already been lawfully detained, was reasonable because loss of the trace amount had only a de minimis impact on any protected property interest and that, under these circumstances, the safeguards of a warrant would only minimally advance Fourth Amendment interests. *Jacobsen*, 466 U.S. at 125. The Court in *Jacobsen* added a significant caveat: "Of course, where more substantial invasions of constitutionally protected interests are involved, a warrantless search or seizure is unreasonable in the absence of exigent circumstances." *Id.* at 125 n. 28 (citing authorities).

Thus, the *Jacobsen-Place* balancing test is not appropriate in this case. The seizure of the plaintiffs' real property was not lawful in its inception. Because their seized buildings were totally and permanently destroyed, it cannot be said that the seizure had only a de minimis impact on their protected property interests. The invasions of the plaintiffs' protected interests were more than "substantial." Under these circumstances, it cannot be said that the safeguards of a warrant would have only minimally advanced Fourth Amendment interests. Another panel of this court recently held that the holding in *Jacobsen* would not be extended to cases involving permanent seizures. *United State v. Paige*, 136 F.3d at 1022. Because there were no exigent circumstances, the warrantless seizure and destruction of plaintiffs' property

was unreasonable and a violation of the Fourth Amendment. *Jacobsen*, 466 U.S. at 125 n.28.

III. DUE PROCESS[2**]

The district court granted the City of Dallas's motion for summary judgment on the issue of whether due process requirements were satisfied in the seizure and destruction of Plaintiff's property. This court reviews a grant of summary judgment de novo, applying the same standard as the district court. *Martin v. Memorial Hospital*, 130 F.3d 1143, 1147 (5th Cir. 1997). Summary judgment is appropriate if the evidence, viewed in the light most favorable to the non-movant, presents no genuine issue of material fact and if the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The Fourteenth Amendment prohibits the government from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. This guarantee affords procedural protections. *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986). The government must give reasonable notice to an individual of its intention to deprive him of life, liberty, or property. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-15 (1950). It also must provide him with a meaningful opportunity to be heard. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976); *Mullane*, 339 U.S. at 313-14. Following *Matthews*, we assess what process is due by considering and balancing three distinct factors:

---

[2] **Judge Dennis does not agree with the majority as to this part of the opinion and dissents therefrom with reasons.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews, 424 U.S. at 335. This approach reflects the fact that "due process is flexible and calls for such procedural protections as the particular situation demands."[3] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *accord Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343, 345 (5th Cir.) (per curiam) ("Procedural due process is an inherently flexible concept."), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2362, ___ L.Ed.2d ___ (1999).

The Plaintiffs contend that they were denied a meaningful opportunity to be heard on the future of the apartment buildings because they were not told that the Department of Housing and Neighborhood Services had briefed panel members on their properties, they were not provided with the Department's information on their properties, they were not given notice of the tours of their

---

[3] Applying the three-factor *Matthews* test, we usually hold that the individual must be heard prior to the deprivation. *See Zinermon v. Burch*, 494 U.S. 113, 127-28, 110 S.Ct. 975, 984, 108 L.Ed.2d 100, ___ (1990). However, when pre-deprivation procedural safeguards cannot be expected to protect against the type of deprivation involved, we find that a post-deprivation hearing satisfies due process. *See id.* at 128-30, 139, 110 S.Ct. at 984-85, 990, 108 L.Ed.2d at ___.

properties by URSB panel members, and the Department officials who reported the code violations were not present at either the hearings or the rehearings. We generally find a procedure to violate due process when the government fails to reveal its evidence. *See Greene v. McElroy*, 360 U.S. 474, 492-97 (1959). Non-disclosure by the government poses the risk of an erroneous deprivation because it forecloses the individual from testing the accuracy of the government's evidence. *See id.* at 496-97. This threat is so great that it generally outweighs considerations favoring non-disclosure. *Robbins v. United States R.R. Retirement Board*, 594 F.2d 448, 451-52 (5th Cir. 1979). *Cf. Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.").

We conclude that the URSB panel related to the Plaintiffs the evidence supporting the Department's recommendation to level the apartment buildings. During the rehearings, as well as the tour of 2621 Meyers Street preceding them, URSB panel members conveyed to Freeman their concerns over the condition of the apartment buildings. Other members alerted him to the repair cost estimates.[4] Freeman chose not to call the Department officials who had cited the apartment buildings for code

---

[4] Before the rehearings, the URSB panel met with Department staffers to discuss Freeman's request to waive the rehearing fees. According to the transcript of this briefing, this discussion did not focus on whether to raze the apartment buildings.

violations or any other persons as witnesses. Nor did Freeman seek to learn more about the repair cost estimates after the panel informed him of them. *See Richardson v. Perales*, 402 U.S. 389, 407 (1971) (finding that the individual had an opportunity to confront the evidence against him where the government's reports were available to him, and the witnesses were known and were subject to subpoena and cross examination); *Cf. City of West Covina v. Perkins*, 524 U.S. 234, ___ 119 S.Ct. 678, 681-82, 142 L.Ed.2d 636, ___ (1999) (holding that the government need not tell an individual how to recover property seized pursuant to a police search where the state statutes and caselaw do so). Because the URSB panel made Freeman aware of the circumstances favoring demolition, Plaintiffs' assertion that the way in which the Board reached the decision to destroy the apartment buildings failed to accord with due process is without merit.[5]

The Plaintiffs also contend that the absence of a hearing before the liens attached to their properties violated due process. They assert that this omission violated due process because it resulted in the City incurring unreasonable demolition costs, which were passed on to

---

[5] The events surrounding the rehearings make any nondisclosure at the earlier hearings immaterial. *See Glenn v. Newman*, 614 F.2d 467, 470, 473 (5th Cir. 1980) (holding that the decision to terminate the plaintiff after an ex parte hearing did not offend due process because the mayor and city council later heard the plaintiff's evidence and reaffirmed their decision to terminate).

them.[6] The Plaintiffs' argument lacks merit. The City gave Freeman and Brown thirty days to effect the demolitions. This option protected them against the risk of exorbitant demolition costs. A hearing on costs before the demolition could have done no more. Accordingly, we conclude that the lack of a hearing before the attachment of the liens did not violate due process. *Cf. Zinermon v. Burch*, 494 U.S. 113, 127-30 (1990).

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's summary judgments in favor of the City of Dallas on the due process claim and in favor of the Plaintiffs on their Fourth Amendment claim, and the award of damages under § 1983 for the violation of the Plaintiffs' Fourth Amendment rights.

EMILIO M. GARZA, Circuit Judge, dissenting in part:

Charles Freeman and Rosalyn Brown allege that the City of Dallas ("City") violated their Fourth and Fourteenth Amendment rights. The district court granted summary judgment to Freeman and Brown on the Fourth Amendment claim, and to the City on the Fourteenth Amendment claims. Judge Benavides and I agree with the second holding. I alone disagree with the first one. Accordingly, I dissent in part.

---

[6] The Plaintiffs point to the more than $2000 disparity between the actual and estimated demolition costs for each apartment building as proof that the City paid too much.

I.

Brown acquired properties known as 2611 Meyers Street and 2621 Meyers Street located in Dallas, Texas. A vacant, dilapidated eight-unit apartment building stood on each lot. Brown intended to rent the apartment units after making repairs.

The Department of Housing and Neighborhood Services ("Department") cited both apartment buildings for non-compliance with the City's Minimum Urban Rehabilitation Standards Code ("Code"). When the Code violations were not corrected, it referred the matter to the Urban Rehabilitation Standards Board ("Board"), and recommended demolition.

After conducting a title search, the Board mailed a notice of hearing on each of the properties to the owner of record.[7] The notice announced that the Board might order demolition to remedy the Code offenses. It further stated that the property owner would "be given an opportunity to present evidence and witnesses if so desired."

In preparation for the hearings, Department staffers briefed the panel of Board members assigned to decide the fate of the Meyers Street properties. They also provided panel members with information on the properties,

---

[7] The Board did not give Freeman notice because he had no interest in either property at the time. It sent Brown a notice on 2621 Meyers Street, the property of which she was the owner of record. (Brown became the owner of record for 2611 Meyers Street after the Board decided how to address the Code violations.)

including repair cost estimates,[8] and accompanied some of them on a tour of the premises.

Freeman appeared at the hearings, identifying himself as the "attorney-in-fact for Brown" and as an owner of 2611 and 2621 Meyers Street. He reported that he was without funds, and asked for more time to make repairs. Because of Freeman's inability to finance repairs and doubt about his ownership, the panel ordered the destruction of each apartment building as an urban nuisance.[9]

Freeman successfully petitioned the panel for a rehearing. The Board then mailed a notice of the rehearing on 2611 Meyers Street to Freeman and a notice of the

---

[8] The Department determined that the estimated cost of repairs totaled $84,290.00 for 2611 Meyers Street and $108,680.00 for 2621 Meyers Street.

[9] The Code defined an "urban nuisance" as the following:

> [A] premises or structure that:
>
> (A) is reasonably dangerous to the physical health or safety of an occupant or other person; or
>
> (B) because of violations of [the Code] . . . , its state of disrepair is such that it could reasonably cause injury, damage, harm, or inconvenience to a considerable portion of the community in the use and enjoyment of property, materially interfering with the proper use or comfort and enjoyment of surrounding property, taking into consideration the nature and use of the properties in the area and the character of the community in which they are situated, which condition would be substantially offensive and annoying to persons of ordinary sensibilities, tastes, and habits living in the community.

Dallas, Tex., Code ch. 27, art. I, § 27-3(23) (1993).

rehearing on 2621 Meyers Street to Freeman and Brown. The substance of these notices was identical to that of the earlier hearing notices.

Two panel members visited the properties before the rehearings. They examined the exterior of the apartment building at 2611 Meyers Street. They ran into Freeman at 2621 Meyers Street. He showed them repairs inside of the apartment building. They told him to bring photographs of the repairs to the rehearings.[10]

At the rehearings, the Department showed pictures of the apartment buildings' exteriors. Freeman said that he anticipated acquiring most of the materials required to make repairs at little or no cost. He further stated that he hoped to finance repairs through a loan from the City, and had received a commitment from relatives in the construction business to help him make repairs if he secured funding from the City. Freeman also submitted photographs of repairs made to the interior of the apartment building at 2621 Meyers Street and a list of materials that he had collected already. Finally, he asserted that he could upgrade each unit of the apartment building at 2621 Meyers Street for $2000.00. Panel members responded skeptically to Freeman's presentation. Among their comments to Freeman were the following:

> MR. KIRKPATRICK: And I strongly appreciate you [sic] intent with what you would like to do with the property [i.e., 2611 Meyers Street]. The

---

[10] Before the rehearings, the panel met with Department staffers to discuss Freeman's request to waive the rehearing fees.

property is in serious disarrayI mean, foundation, structurally. We saw . . . looked at the staff recommendations for improvement. Are you aware of the total of which they have estimated, $84,310?

. . .

MS. LOCKLEY: Are you aware of the amount of money the staff has sort of generally come up with to say how much your expenses might be for the repairs [to 2621 Meyers Street]?

Despite such statements, Freeman neither inquired about the basis for the repair cost estimates nor asked to question the Department officials responsible for them.

The panel again voted to declare the apartment buildings urban nuisances and to order their destruction because it still was unpersuaded that Freeman possessed the financial ability to make repairs in a timely manner. Freeman received a notice of demolition for each property at the end of the rehearings. The notice identified the parcel by lot and block number, as well as by street address, and stated that the panel's decision could be appealed to state district court for review under the substantial evidence rule.

The Board also sent a notice of the order to demolish the apartment building at 2611 Meyers Street to Freeman and a notice of the order to demolish the apartment building at 2621 Meyers Street to Freeman and Brown. Each notice declared, in part:

If you do not demolish the structure(s) within the time above indicated [i.e., 30 days], the city will arrange to have this work done and the

> expense of that demolition performed under contract with the city will constitute a lien on the real property on which the structure(s) were located, and that lien will run with the land.

Freeman and Brown did not petition the state district court to review the demolition orders. When they failed to raze the apartment buildings within thirty days, the City hired a contractor to do so. It did not convene a hearing to discuss demolition costs before the contractor undertook performance. Nor did it obtain a judicial warrant. After the demolitions, a lien attached to each piece of property equal to the cost of demolition$7954.72 for 2611 Meyers Street and $7655.55 for 2621 Meyers Street. Each lien exceeded by more than $2000.00 the demolition cost estimate that the Department had made when it had found the apartment buildings in violation of the Code.

Freeman and Brown filed a 42 U.S.C. § 1983 action against the City. They alleged that the destruction of apartment buildings constituted an unreasonable seizure in violation of the Fourth Amendment. They also maintained that the way in which the panel had decided to demolish the apartment buildings and the imposition of the liens contravened the Fourteenth Amendment's guarantee of procedural due process.

Freeman and Brown moved for summary judgment on the Fourth Amendment claim. In response, the City requested summary judgment on all claims. The district court granted summary judgment to Freeman and Brown on the Fourth Amendment claim, denied the City's cross-motion for summary judgment on the Fourth Amendment claim, and granted summary judgment to the City on the Fourteenth Amendment claims. After a trial on

damages for the Fourth Amendment violation, a jury awarded $20,000.00 to Freeman and Brown. Timely appeals followed the entry of final judgment.

II

We review a grant of summary judgment *de novo*. *See United States v. Johnson*, 160 F.3d 1061, 1063 (5th Cir. 1998). Summary judgment occurs if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Our review encompasses only the record on which the district court based its ruling. See *Topalian v. Ehrman*, 954 F.2d 1125, 1131-32 n.10 (5th Cir. 1992).

III

The City argues that the district court erred in granting summary judgment to Freeman and Brown on the Fourth Amendment claim. In its view, the district court wrongly held that the lack of a valid judicial warrant rendered the demolitions of the apartment buildings impermissible seizures.[11]

The Fourth Amendment declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

---

[11] The City does not contest that the demolitions were seizures. *See Soldal v. Cook County, Ill.*, 506 U.S. 56, 72, 113 S. Ct. 538, 549, 121 L. Ed. 2d 450, ___ (1992) (tearing mobile home from its foundation and towing it to another lot is a seizure).

> probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. In determining if a particular governmental action violates this constitutional guarantee, we initially must consider whether or not the action was regarded as an unlawful search or seizure under the common law when the Fourth Amendment was framed. *See Wyoming v. Houghton*, ___ U.S. ___, ___, 119 S. Ct. 1297, 1300, 143 L. Ed. 2d 408, ___ (1999). When this examination of the historical record yields no answer, we must decide whether or not the action was reasonable. *See id.*; *see also Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347, ___ (1996) ("the touchstone of the Fourth Amendment is reasonableness" (internal quotations omitted)); *Carroll v. United States*, 267 U.S. 132, 147, 45 S. Ct. 280, 283, 69 L. Ed. 2d 543, ___ (1925) ("The Fourth Amendment does not denounce all searches and seizures, but only such as are unreasonable."). A "reasonableness determination . . . reflects a 'careful balancing of governmental and private interests.' " *Soldal v. Cook County, Ill.*, 506 U.S. 56, 71, 113 S. Ct. 538, 549, 121 L. Ed. 2d 450, ___ (1992) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S. Ct. 733, 742, 83 L. Ed. 2d 720, ___ (1985)). We deem a seizure reasonable when the government has acted pursuant to a valid judicial warrant that is, a warrant supported by probable cause that particularly describes the things to be seized. *See United States v. Place*, 462 U.S. 696, 701, 103 S. Ct. 2637, 2641, 77 L. Ed. 2d 110, ___ (1983). We also uphold a seizure made without a valid judicial warrant if it strikes the appropriate balance between the competing private and government interests. *See Johnson*

v. United States, 333 U.S. 10, 14-15, 68 S. Ct. 367, 369, 92 L. Ed. 436, ___ (1948). For example, in some circumstances we may find permissible a warrantless seizure of property that occurs after the government has provided the owner with due process. *See G. M. Leasing Corp. v. United States*, 429 U.S. 338, 352 n.18, 97 S. Ct. 619, 628 n.18, 50 L. Ed. 2d 530, ___ n.18 (1977) ("These cases, of course, center upon the Due Process Clause rather than the Fourth Amendment, but the constitutional analysis is similar and yields a like result.").

I agree with the City that the demolitions were reasonable seizures.[12] The intended commercial use of the apartment buildings lessened the interests of Freeman and Brown. *See New York v. Burger*, 482 U.S. 691, 700, 107 S. Ct. 2636, 2642, 96 L. Ed. 2d 601, ___ (1987) ("An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."); *Hroch v. City of Omaha*, 4 F.3d 693, 697 (8th Cir. 1993) (demolition case) (finding that the owner's interest in commercial property "was negligible because he failed to take 'normal precautions to maintain his privacy' "). In contrast, the City possessed a strong interest in demolition – the need to protect the public from hazardous buildings. *See Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523, 537, 87 S. Ct. 1727, 1735, 18 L. Ed. 2d 930, ___ (1967) (discussing when a housing inspector may inspect buildings

---

[12] Neither side makes arguments regarding the lawfulness of the type of seizures at issue here under the common law when the Fourth Amendment was framed. Instead, everyone focuses on the reasonableness of the seizure.

without a warrant) ("the public interest demands that all dangerous conditions be prevented or abated"). It, moreover, effected the seizures after Freeman and Brown had received reasonable notice, a meaningful opportunity to be heard, and a chance to seek judicial review. This due process guarded the interests of Freeman and Brown just as well as a valid judicial warrant. *See Samuels v. Meriwether*, 94 F.3d 1163, 1168 (8th Cir. 1996) ("[Our] . . . holdings suggest that an abatement [of a nuisance] carried out in accordance with procedural due process is reasonable [as to the Fourth Amendment] in the absence of any factors that outweigh governmental interests."); *Connor v. City of Santa Ana*, 897 F.2d 1487, 1495 (9th Cir. 1990) (Trott, J., dissenting) ("A warrant and the process used to attain it would have added nothing to the [property owners'] . . . privacy in light of the equivalent substitute process they did receive, or to the independent [judicial] review to which they were entitled."). The City therefore did not violate the Fourth Amendment in this case.[13] The majority errs in holding otherwise.

---

[13] The majority apparently patterns its analysis of the Fourth Amendment claim on *Connor v. City of Santa Ana*, 897 F.2d 1487 (9th Cir. 1990). In *Connor*, municipal authorities claimed that a warrantless confiscation of two abandoned automobiles located on private property was permissible because the entry and seizure were preceded by numerous hearings and appeals. *See id.* at 1489, 1490-91. The Ninth Circuit rejected the argument, holding that the Fourth Amendment obliged the officials to secure a valid judicial warrant because of the absence of "any case . . . [that] has created a 'process' exception to the warrant requirement." *Id.* at 1491. I disagree with *Connor*. When a warantless search or seizure fails to fit within any of the exceptions to the warrant requirement, we do

IV

Unlike the majority, I conclude that the district court improperly granted summary judgment to Freeman and Brown on the Fourth Amendment claim.

Accordingly, I dissent in part.

DENNIS, Circuit Judge, dissenting in part:

A governmental seizure of a person's property implicates two explicit textual sources of constitutional protection, the Fourth and Fifth Amendments. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993); *Soldal v. Cook County*, 506 U.S. 56, 61, 70-71 (1992). Although the decision in *James Daniel Good Real Property* was based upon the procedural protections of the Fifth

---

not, as the Ninth Circuit did in *Connor* and as the majority does in this case, reflexively invalidate it. Rather, we balance the governmental and private interests to determine the legality of the warrantless search or seizure. *See Whren v. United States*, 517 U.S. 806, 817, 116 S. Ct. 1769, 1776, 135 L. Ed. 2d 89, ___ (1996) ("It is of course true that in principle every Fourth Amendment case, since it turns upon a 'reasonableness determination,' involves a balancing of all relevant factors."); *California v. Acevedo*, 500 U.S. 565, 581-84, 111 S. Ct. 1982, 1992-94, 114 L. Ed. 2d 619, ___ (1991) (Scalia, J., concurring in the judgment) (recognizing that reasonableness, not the existence of a valid judicial warrant, is the Fourth Amendment's chief concern); *Johnson v. United States*, 333 U.S. 10, 14-15, 68 S. Ct. 367, 369, 92 L. Ed. 436, ___ (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by the judicial officer, not by a police-man or Government enforcement agent. There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with.").

Amendment's Due Process Clause, the similarly worded procedural protections of the Fourteenth Amendment's Due Process Clause apply with equal force to states and municipalities.[14]

The City does not, and could not, dispute that the seizure and destruction of the plaintiffs' real property

---

[14] The Supreme Court has held that the Fourteenth Amendment's Due Process Clause "legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress." *Hibben v. Smith*, 191 U.S. 310, 325 (1903). Of the guarantees of the Fifth Amendment, only the grand jury clause has been held not to be applicable to the states. 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 14.2, at 347-48 (2d ed. 1992) (citing *Hurtado v. California*, 110 U.S. 516 (1884)). The Fifth Amendment prohibitions of compulsory self-incrimination and double jeopardy were made applicable to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Benton v. Maryland*, 395 U.S. 784 (1969), respectively. In addition, although the Fifth Amendment's just compensation provision has not "technically" been incorporated against the states, "the Court has held that the fourteenth amendment due process guarantee provides the same safeguard against a state's taking of property without just compensation." Rotunda & Nowak, *supra*, § 14.2, at 350 (citing *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)). *See also Hurtado v. California*, 110 U.S. 516, 541 (1884) (Harlan, J., dissenting) ("[T]he 5th [amendment] provided that 'no person shall be deprived of life, liberty or property, without due process of law.' This language is similar to that of the clause of the 14th amendment now under examination. That similarity was not accidental, but evinces a purpose to impose upon the States the same restrictions, in respect of proceedings involving life, liberty and property, which had been imposed upon the General Government.").

deprived them of property interests protected by the Fifth and Fourteenth Amendments' Due Process Clauses. The City argues, however, that a hearing before a panel of the City's own Urban Rehabilitation Standards Board afforded the plaintiffs all the process they were due before their property was seized and destroyed. Although the majority agrees, I believe that in the absence of an extraordinary situation, which did not exist in the present case, the Due Process Clauses require that, before a person is deprived of his real property by the government, he must be given notice and an opportunity for a meaningful hearing before a neutral magistrate, and that there must be a judicial determination that the seizure is justified.

Where the government seizes property not to preserve evidence of criminal wrongdoing but to assert ownership and control over the property, its action must also comply with the procedural protections of the Due Process Clauses of the Fifth and Fourteenth Amendments. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993), and footnote 1, supra. The Supreme Court's precedents establish the general rule that Due Process requires that, absent an extraordinary situation, a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. *United States v. $8,850*, 461 U.S. 555, 562 n.12 (1983) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971)). See also *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1974). *Cf. Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Due Process also requires that individuals must

receive notice and an opportunity to be heard before the government deprives them of property. *James Daniel Good Real Property*, 510 U.S. at 48 (citing *United States v. $8,850*, supra; *Fuentes v. Shevin*, supra; *Sniadach v. Family Finance Corp.*, 395 U.S. at 342 (Harlan, J., concurring); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

In *United States v. James Daniel Good Real Property*, supra, the Supreme Court held that, in the absence of exigent circumstances, the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard in an adversary hearing, to ensure the requisite neutrality that must inform governmental decisionmaking, before seizing real property subject to civil forfeiture. *Id.* at 48, 53-56. The protection of an adversary hearing before a neutral magistrate is of particular importance where the government has a direct pecuniary interest in the outcome of the proceeding. *Id.* at 55-56. In *James Daniel Good Real Property*, the Supreme Court emphasized that "[t]he constitutional limitations we enforce in this case apply to real property in general, not simply to residences." Id. at 61.

Accordingly, the Due Process requirements of notice, a meaningful adversary hearing before a neutral magistrate, and a judicial determination of justification must be afforded to a person before his real property is seized and destroyed in order to abate or rehabilitate an "urban nuisance." In a case such as the present one, there is need for equally rigorous adherence to the principles of Due Process as in civil forfeitures of real property. The City of Dallas has pecuniary interests in the outcome of such proceedings, e.g., justification for federal and state urban renewal grants; enhancement of the municipal tax base

by promoting the replacement of old buildings with new ones. The need for safeguards against arbitrary, capricious or unreasonable seizures based on subjective standards may be even greater in "urban nuisance" or "urban rehabilitation" cases. Moreover, a post-seizure hearing cannot provide any remedy in such cases because the destroyed property cannot be restored and the best evidence of whether the seizure was justified will have been demolished also. It is not necessary to accomplish the City's legitimate goals of urban rehabilitation that an owner whose real property the City proposes to destroy be deprived of an opportunity for a meaningful pre-seizure adversary hearing before a neutral and impartial judge or magistrate. Requiring the City to postpone seizure and destruction until after such a hearing and judicial determination that the seizure is justified creates no significant administrative burden. And any harm that results from delay is minimal in comparison to the injury occasioned by the erroneous seizure and destruction of real property. *Id.* at 59.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Charles Freeman and Rosalyn Brown, plaintiffs	)	No. 3:96-CV-1108-DES
v.	)	
City of Dallas, defendant	)	

JUDGMENT

(Filed Aug 13 1997)

For the reasons set forth on the record on July 24, 1997, it is ordered that Plaintiffs' Motion for Partial Summary Judgment be granted in part and denied in part and Defendant's Motion for Summary Judgment be granted in part and denied in part as follows:

1. As a matter of law, the Court finds that the City's seizure and demolition of plaintiffs' structures at 2611 and 2621 Meyers St. without a warrant was an unreasonable seizure of plaintiffs' property in violation of the Fourth Amendment to the U.S. Constitution.

2. The Court finds that the Urban Rehabilitation Standards Board [URSB] alone sets and carries out the policy for the City of Dallas with regard to establishing minimum standards applicable to residential and nonresidential structures. This kind of binding policy making authority constitutes official policy of the City of Dallas. The Court finds and orders that the City is liable under 42

U.S.C. § 1983 as a matter of law for the conduct of the URSB which caused or contributed to the cause of plaintiffs' harm.

3. As a matter of law, the Court finds that plaintiffs were not deprived of due process under the Fourteenth Amendment to the U.S. Constitution by the URSB hearing process or by the failure to provide a hearing on the amount or legality of the lien for the costs of demolition.

This case was submitted to the jury on the issue of damages to be awarded to plaintiffs for deprivation of the Fourth Amendment constitutional right not to have property seized without a warrant. For this deprivation, the jury awarded $20,000 in damages to plaintiffs and $0 in emotional distress or mental anguish for a total damage amount of $20,000.

It is ordered that the City of Dallas pay plaintiffs $20,000. Post-judgment interest shall accrue from the date of entry of the judgment pursuant to 28 U.S.C. § 1961 at the federal rate.

This judgment is final except for any motion for attorneys' fees and expenses.

8-11-97
DATE

/s/ Dale E. Saffels
UNITED STATES
DISTRICT JUDGE
Dale E. Saffels
Sitting by Designation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES FREEMAN and ROSALYN BROWN	*	Civil No. 3:96-CV-1108
vs.	*	Dallas, Texas
CITY OF DALLAS	*	July 24, 1997 9:00 a.m.

****

Volume 1
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DALE E. SAFFELS,
SENIOR UNITED STATES DISTRICT JUDGE
and a Jury

(Filed Oct. 23, 1997)

APPEARANCES:

For the Plaintiffs:	Mr. Michael M. Daniel and Ms. Laura B. Beshara Attorneys at Law 3301 Elm Street Dallas, Texas 75226-1637 (214) 939-9230
For the Defendant:	Mr. Walter C. Davis, III and Mr. W. Kent McIlyar Assistant City Attorneys 1500 Marilla Street Dallas, Texas 75201 (214) 670-3510
Official Court Reporter:	Deborah M. Roberts, CSR 523 United States Courthouse 501 West 10th Street Fort Worth, Texas 76102-3637 (817) 239-2037

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

[14] We think the law shows that, in fact, when you are seizing people's property, you have to have either a warrant or a judicial order in order to satisfy the Fourth Amendment.

On the liens, the Fifth Circuit – the Supreme Court is also very clear. Imposition of a lien which causes a burden on title requires due process itself. In this instance, the City determines the cost of the demolition, pays the cost. There's no relationship, necessarily, to the cost that is even talked about at the hearing, if it's talked about at all, then that lien is put on there. That clearly requires a separate due process procedure.

Thank you, Your Honor.

THE COURT: Any response?

MR. McILYAR: Not at this time, Your Honor.

THE COURT: Anything further to present on this general issue, disposition of these legal questions?

MR. DANIEL: Pardon? I'm sorry.

THE COURT: Anything else you want to present on –

MR. DANIEL: Plaintiffs have nothing further, Your Honor.

MR. McILYAR: Defendant has nothing further, Your Honor.

THE COURT: Very well. We spent some time on this file before the hearing this morning, and we heard your arguments, and we're going to make our ruling here.

[15] Number one, the Court finds the Fourth Amendment requires that the state must have a valid warrant to effectuate a seizure. This warrant requirement applies regardless of how reasonable the warrant procedure appears in light of the pre-seizure process afforded the plaintiffs. Because the seizure of the plaintiffs' buildings occurred without any judicial authorization, the Court finds that the seizure as a matter of law violated the plaintiffs' Fourth Amendment rights.

Number two, due process before demolition. The Court finds the abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the due process clause. See case Honda Motor Company, Limited, versus Oberg, 510 U.S. 1068, 430 [sic], 1994. However, not all deviations from established procedure result in constitutional infirmity. Where procedures provide protection against other arbitrary and inaccurate adjudication, and there is little danger of arbitrary deprivation of property, the United States Constitution does not require that a judicial determination precede deprivation. See Traylor versus City of Amarillo. Both of you are familiar with that case.

In this case the Court finds as a matter of law that the due process does not require that a full judicial determination precede demolition of property found to be a [16] nuisance by the URSB. The Court also finds that the –

that adequate procedural safeguards and the notices hearings and opportunities for compliance were provided by the URSB.

Number three, due process before filing demolition cost liens. The Court finds as a matter of law that the City did not violate plaintiffs' due process rights by filing liens to recover demolition, expenses against the real property on which the demolished structures were located.

Four, official policy of the City of Dallas. The Court finds that under Swann versus City of Dallas, 922 F.Supp. 1184, Northern District of Texas, 1996, URSB alone sets and carries out the policy of the City of Dallas with regard to establishing minimum standards applicable to residential and non-residential structures. This kind of binding policy-making authority constitutes the kind of official policy for which the City may be held liable.

It appears to us that we have left a question of damages on the failure to obtain a search warrant, and we're prepared to go to trial on that at 10:00 this morning.

Any questions?

MR. DANIEL: No questions, Your Honor.

THE COURT: Is there any chance of settling that issue?

MR. DAVIS: Your Honor, we'll certainly discuss it with plaintiff in this case, but I would not lead the Court to

* * *

[128] MR. DAVIS: No questions, Your Honor.

THE COURT: It's been a pleasure to do business with you. All of you have a good day.

MR. DANIEL: Thank you, Judge.

MR. DAVIS: Thank you, Your Honor.

THE COURT: You may recess the Court.

(Proceedings concluded at 4:30 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

/s/ Deborah M. Roberts — 10-23-97

Deborah M. Roberts, — Date
Official Court Reporter
Texas CSR #3770

Supreme Court, U.S.
FILED
JUL 31 2001
CLERK

No. 00-1755

In The

Supreme Court of the United States

CHARLES FREEMAN and ROSALYN BROWN,

Petitioners,

v.

CITY OF DALLAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT THE CITY OF DALLAS IN OPPOSITION

City Attorney of the City of Dallas

PETER B. HASKEL
Assistant City Attorney
Counsel of Record

OFFICE OF THE DALLAS CITY ATTORNEY
City Hall, 1500 Marilla, 7/b/north
Dallas TX 75201
(214) 670-3519
(214) 670-0622 (Telecopier)

Attorney for City of Dallas, Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the Fourth Amendment prohibition against "unreasonable . . . Seizures" of property require a separate judicial seizure warrant prior to a building demolition that is accomplished pursuant to a quasi-judicial municipal board order issued after notice, the opportunity to be heard, and the right to judicial appeal, regardless of the reasonableness of the administrative order?

2. Did the owners of two vacant multi-unit residential apartment buildings demolished by the City of Dallas as "urban nuisances" receive adequate procedural due process under the Fourteenth Amendment in connection with the demolitions of their buildings under the facts of this case?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, AND REGULATIONS 2

STATEMENT OF THE CASE 3

A. Course Of Proceedings and Disposition 3

B. Statement of Facts 5

1. Petitioners' Acquisition of the Properties .. 5

2. The URSB 6

3. 2611 Meyers Street Property and First URSB Hearing Thereon 8

4. 2621 Meyers Street Property and First URSB Hearing Thereon 10

5. The URSB Rehearings 12

6. The URSB Final Orders and Notices of Right to Appeal 14

ARGUMENT 14

A. Introduction 14

B. There was No Disregard of this Court's Precedents 16

TABLE OF CONTENTS – Continued

Page

1. The Opinion Below Did Not Conflict With This Court's Fourth Amendment Precedents 16

2. The Opinion Below Did Not Conflict With This Court's Procedural Due Process Precedents 17

C. The Opinion Below Created No Conflict Among the Circuit Courts 21

D. The Court of Appeals Correctly Decided This Case 23

1. The "Seizures" of Petitioners' Abandoned Buildings Pursuant to Administrative Demolition Orders Were Reasonable Under the Facts of this Case, and Thus Permissible under the Fourth Amendment 23

2. Petitioners Received Adequate Procedural Due Process Under the Facts of This Case 26

CONCLUSION 30

RESPONDENT'S APPENDIX

Memorandum and Order, *Freeman v. City of Dallas*, Case No. 3-96-CV-1108-DES (N.D. Tex. October 9, 1997) (unpublished) .....Resp. App. 1

United States Court of Appeals for the Fifth Circuit, Local Rule 41.3.....Resp. App. 4

Texas Constitution, Article 1, Section 13...Resp. App. 5

TABLE OF CONTENTS – Continued

Page

Texas Constitution, Article 11, Section 5...Resp. App. 5

Texas Civil Practice & Remedies Code Section 65.001.....Resp. App. 7

Texas Civil Practice & Remedies Code Section 65.011.....Resp. App. 7

Texas Local Government Code, Section 54.031 .....Resp. App. 8

Texas Local Government Code, Section 54.039 .....Resp. App. 8

Texas Local Government Code, Section 214.001 .....Resp. App. 10

Texas Local Government Code, Section 214.0012 .....Resp. App. 18

Texas Rule of Civil Procedure 680.....Resp. App. 20

Dallas, Texas, Charter, Table of Contents ... Resp. App. 22

Dallas, Texas, Charter, ch. I.....Resp. App. 23

Dallas, Texas, Charter, ch. II .....Resp. App. 24

Dallas, Texas, Charter ch. XV .....Resp. App. 35

Dallas, Texas, Code, ch. 27.....Resp. App. 41

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90 (1980) 26

Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967) 16

Cedar Crest No. 10, Inc. v. City of Dallas, 754 S.W.2d 351 (Tex. App. – Eastland 1988, no writ), *cert. denied*, 490 U.S. 1081 (1989) 18, 20, 21

City of Sherman v. Henry, 928 S.W.2d 464 (Tex. 1996), *cert. denied*, 519 U.S. 1156 (1997) 19

Conner v. City of Santa Ana, 897 F.2d 1487 (9th Cir.), *cert. denied*, 498 U.S. 816 (1990) 21, 22, 23

Criswell v. City of Dallas, Texas, 2001 WL 609480, Civ. Case No. 3:00-CV-0687-G (N.D. Tex. May 29, 2001) (unpublished) 29

Crossman v. City of Galveston, 247 S.W. 810 (Tex. 1923) 20

Donovan v. Dewey, 452 U.S. 594 (1981) 23

Dugan v. Ohio, 277 U.S. 61 (1928) 25

Florida v. White, 526 U.S. 559 (1999) 24

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) 16, 17, 22, 24

Honda Motors, Inc. v. Oberg, 512 U.S. 415 (1994) 17, 18, 20

Hroch v. City of Omaha, 4 F.3d 693 (8th Cir. 1993) ... 21, 23

James v. City of Dallas, ___ F.3d ___, 2001 WL 682089, Case No. 00-10556 (5th Cir. June 18, 2001) 16

TABLE OF AUTHORITIES – Continued

Page

Johnson v. United States, 333 U.S. 10 (1948) 24

Mathews v. Eldridge, 424 U.S. 319 (1976) 27

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 27

Nash v. City of Lubbock, 888 S.W.2d 557 (Tex.App. – Amarillo 1994, no writ) 19

New York v. Burger, 482 U.S. 691 (1987) 24

Nussbaum v. City of Dallas, 948 S.W.2d 305 (Tex.App. – Dallas 1996, no writ) 19

Oliver v. United States, 466 U.S. 170 (1984) 25

Samuels v. Meriwether, 94 F.3d 1163 (8th Cir. 1996) 23

See v. City of Seattle, 387 U.S. 541 (1967) 16

Shadwick v. City of Tampa, 407 U.S. 345 (1972) 25

Soldal v. Cook County, Ill., 506 U.S. 56 (1992) 16

Tumey v. Ohio, 273 U.S. 510 (1927) 25

United States v. Rabinowitz, 339 U.S. 56 (1950) 17

University of Tennessee v. Elliott, 478 U.S. 788 (1986) 26

Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972) 25

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Constitution

Amend. 4 ..... *passim*

Amend. 14 ..... 3, 15, 18, 23

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1983 ..... 3, 26

Federal Rule of Appellate Procedure 8 28

U.S. Supreme Court Rule 23 28

U.S. Court of Appeals Fifth Circuit Local Rule 41.3 ... 2, 5

Texas Constitution

Article 1, Section 13 ..... 2, 19

Article 11, Section 5 ..... 2, 20

Texas Civil Practice & Remedies Code

§ 65.001 ..... 2, 28

§ 65.011 ..... 2, 28

Texas Government Code § 2001.174 ..... 8, 19

Texas Local Government Code

Subchapter C Title 2 Subtitle D, Chapter 54 (§§ 54.032-54.043) 25

§ 54.031 ..... 2, 28

§ 54.039 ..... 2, 18

§ 54.039(b)-(e) 19

§ 54.039(e) 19, 28

§ 214.001 2

§ 214.001(a) 28

§ 214.001(b)-(e) 19

§ 214.0012(e) 18, 19, 28

TABLE OF AUTHORITIES – Continued

Page

Texas Rule of Civil Procedure 680.....2, 28

Dallas, Texas, Charter

ch. I

§ 1.....20

§ 1(16).....21

§ 1(18).....21

§ 1(24).....21

§ 1(28).....21

§ 1(31).....21

ch. II

§ 2.....21

ch. XV

§ 2.....6, 21

Dallas, Texas, Code, ch. 27

§ 27-1.....6

§ 27-2.....6

§ 27-3(3).....6

§ 27-3(23).....17

§ 27-3(23)(A).....29

§ 27-3(23)(B).....29, 30

§ 27-6(a).....7

TABLE OF AUTHORITIES – Continued

Page

§ 27-8(a) 7

§ 27-9 7

§ 27-9(c) 7

§ 27-9(d) 7

§ 27-9(e) 7, 18, 21

§ 27-11 29

§ 27-11(a)-(d) 29

§ 27-11(b)(2) 29

§ 27-11(c)(4) 29

§ 27-13 29

§ 27-14 7

§ 27-14.3 7

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent the City of Dallas, Texas, a Texas Home Rule Municipal Corporation (the "City" or "Dallas"), asks the Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (the "Petition") in this case, and shows as follows.

OPINIONS BELOW

The Petition adequately sets forth the opinions below (Pet. 1),[1] except that it should have specified that the reinstatement of the portion of the court of appeals' "panel opinion concerning the Due Process claims" is in footnote 4 of the en banc opinion (Pet. App. 8), and the reinstated portion of the panel opinion is reproduced at Pet. App. 65-69. In addition, on October 9, 1997, the district court issued an unreported Memorandum and Order denying Petitioners' post-judgment motion to alter or amend judgement. (Resp. App. 1-3).

[1] Citations to pages in the Petition will be in the form "Pet. [page number(s)]"; to the Appendix to the Petition in the form "Pet. App. [page number(s)]"; to the Appendix to this Response in the form "Resp. App. [page number(s)]"; and to the record on appeal in the form "R. vol. [volume number], p. [page number(s)]." Because there are potentially confusing page number stamps in Record volume 2, page number citations to that volume are preceded by a zero (*e.g.*, "p. 014") to distinguish the Record on Appeal page numbers from other stamped numbers on the pages.

JURISDICTION

The Petition adequately states the jurisdictional requisites.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, AND REGULATIONS

In addition to the provisions of the Fourth and Fourteenth Amendments to the Constitution of the United States reproduced by Petitioners (Pet. 1-2), the following are reproduced at the pages indicated in the Respondent's Appendix: United States Court of Appeals for the Fifth Circuit Local Rule 41.3 (Resp. App. 4); Texas Constitution, Article 1, Section 13 (Resp. App. 5); Texas Constitution, Article 11, Section 5 (Resp. App. 5-6); Texas Civil Practice & Remedies Code, Section 65.001 (Resp. App. 7); Texas Civil Practice & Remedies Code, Section 65.011 (Resp. App. 7-8); Texas Local Government Code, Section 54.031 (Resp. App. 8); Texas Local Government Code, Section 54.039 (Resp. App. 8-10); Texas Local Government Code, Section 214.001 (Resp. App. 10-17); Texas Local Government Code, Section 214.0012 (Resp. App. 18-19); Texas Rule of Civil Procedure 680 (Resp. App. 20-21); Dallas, Texas, Charter, Table of Contents (Resp. App. 22-23); Dallas, Texas, Charter, ch. I (Resp. App. 23-24); Dallas, Texas, Charter, ch. II (Resp. App. 24-34); Dallas, Texas, Charter ch. XV (Resp. App. 35-40); and Dallas, Texas, Code, ch. 27 (Resp. App. 41-100).

STATEMENT OF THE CASE

This case arises from the City's demolition as "urban nuisances" of two vacant multi-unit apartment houses owned by the Petitioners. The City's Urban Rehabilitation Standards Board (the "Board" or the "URSB") ordered the demolitions through a quasi-judicial procedure authorized by the City Charter and the City Code after hearings notices, and after hearings and rehearings at which the Petitioners participated, and after notifying them of their absolute right to appeal the Board's orders to state district court. They did not appeal. Instead, after the demolitions, they collaterally attacked the Board's orders in federal district court under the Fourth Amendment's warrant clause and the Fourteenth Amendment's procedural due process provisions, seeking money damages and an injunction against a lien for the City's demolition expenses.

A. Course of Proceedings and Disposition

James Freeman ("Freeman") and Rosalyn Brown ("Brown") (together the "Petitioners" or the "Owners") filed their original complaint under 42 U.S.C. § 1983 for money damages and permanent injunction against the City in the United States District Court for the Northern District of Texas in Dallas on April 23, 1996. (R. vol. 1, p. 1). Petitioners claimed that they were not provided due process before the structures were demolished, and that the City violated the Fourth Amendment's prohibition against unreasonable seizures by demolishing the structures without first obtaining a judicial seizure order. (R. vol. 1, p. 3). Petitioners further claimed that the City should have given them another hearing before imposing

a lien against their property for the cost of demolition. (R. vol. 1, p. 3-4).

On July 24, 1997, the district court ruled on cross-motions for summary judgment that: (1) The City's seizures (by demolition) of Petitioners' buildings occurred without judicial authorization, and therefore, the seizures violated Petitioners' Fourth Amendment rights as a matter of law; (2) In this case, due process does not require that a full judicial determination precede demolition of property found to be a nuisance by the URSB; (3) Adequate procedural safeguards: notices, hearings and opportunities for compliance were provided to Petitioners; (4) The City did not violate Petitioners' due process rights by filing a lien against Petitioners' property to recover demolition expenses; and (5) The URSB alone sets and carries out the policy of the City of Dallas with regard to establishing minimum standards applicable to residential and non-residential structures. (Pet. App. 88-89). These rulings were later substantially incorporated into the district court judgment. (Pet. App. 84-85). As the district court later explained when it rejected Petitioners' post-judgment motion, "[t]he court did not question the City's ultimate right to demolish property found to be a nuisance by the City Urban Rehabilitation Standards Board. The court merely found that the Fourth Amendment required the City to obtain a warrant before effectuating such demolition." (Resp. App. 3).

On July 27, 1997, following a one-day jury trial on damages for the Fourth Amendment violations, the district judge accepted the jury's verdict on damages and, on August 13, 1997, entered a final judgment against the City in the amount of $20,000, plus post-judgment interest accruing at the federal rate. (Pet. App. 84-85). The district

judge later denied Petitioners' post-judgment motion to alter or amend the judgment and for permanent injunction against maintaining a lien against Petitioners' property for the costs of demolition in a memorandum and order entered on October 9, 1997. (Resp. App. 1-3).

In the meantime, the City filed its notice of appeal from the judgment on August 22, 1997. Petitioners cross-appealed from the judgment and from the order denying their motion to alter and amend judgment on November 3, 1997. After briefs and oral argument, a divided panel of the court of appeals affirmed the district court judgment, holding that there had been a Fourth Amendment violation but no Due Process deprivation. (Pet. App. 56 *et seq.*).

Upon the City's timely motion, the court of appeals granted reconsideration en banc, thereby vacating the panel opinion and staying the court's mandate and judgment under Local Fifth Circuit Rule 41.3. (Resp. App. 4). A majority en banc court opinion reversed the district court judgment against the City on the Fourth Amendment issue, holding that under the circumstances the demolitions constituted reasonable seizures (Pet. App. 25), and reinstated the portion of the panel opinion holding that the URSB had accorded the Petitioners adequate Due Process under the circumstances. (Pet. App. 8 n.4, 65-69).

B. Statement of Facts

1. Petitioners' Acquisition of the Properties

Between December 1992 and April 1993, Brown purchased two vacant apartment buildings in Dallas, Texas – at 2611 Meyers Street and 2621 Meyers Street. (R. vol. 6,

p. 23-25, 82-83). Brown paid one dollar for the 2611 Meyers structure and ten dollars for the building at 2621 Meyers. (R. vol. 8, p. 78). She did not record her deed to 2611 Meyers Street until August 3, 1994. (R. vol. 6, p. 23-25). She did not record her deed to 2621 Meyers Street until July 1, 1993. (R. vol. 6, p. 82-83). The buildings had been vacant for six months before Brown bought them. (R. vol. 8, p. 81). The buildings remained vacant throughout Petitioners' approximately two-year ownership. (R. vol. 8, p. 101). Freeman was Brown's brother. (R. vol. 8, p. 78). Brown deeded a one-percent undivided interest in both properties to Freeman on August 11, 1994 (R. vol. 6, p. 79-80, 133-134), and asked Freeman to act as the general contractor to be responsible for necessary repairs to the two structures. (R. vol. 8, p. 79). Freeman was not a registered engineer or architect, nor did he possess a general contractor's license or trade license from the State of Texas. (R. vol. 8, p. 75-77). Freeman did not have a construction company or even a crew working for him. (R. vol. 8, p. 79).

2. The URSB

The URSB is the quasi-judicial City agency charged with enforcing minimum housing standards, including determination whether property condition reports filed by city inspectors identify violations of municipal codes. (Pet. App. 3; Dallas, Texas, Charter ("City Charter"), ch. XV, § 2 at Resp. App. 36; City Code §§ 27-1 at Resp. App. 42-43, 27-2 at Resp. App. 43, 27-3(3) at Resp. App. 44, 27-6 at Resp. App. 54-55; 27-8 at Resp. App. 57-58). The thirty members and eight alternate members of the Board are appointed by the Dallas City Council. (City Code

§ 27-6(a) at Resp. App. 54). Members of the Board include an architect, home builder, licensed real estate broker, social worker, and structural engineer, each with at least 10 years' experience, and other members "chosen on the basis of their interest in the community." (City Code § 27-6(a) at Resp. App. 54-55). After a hearing, the URSB decides whether a given structure is an "urban nuisance" and, if so, may order various remedial measures including repairs, receivership, the closing and vacating of buildings, and demolition; and impose civil penalties of up to two thousand dollars a day against property owners who fail to obey such order. (City Code § 27-8(a) at Resp. App. 57-58). The URSB functions through hearing panels of Board members under procedures in the City Code and any additional rules that the Board may adopt if they are not inconsistent with City Code provisions. (City Code § 27-9 at Resp. App. 59). At a hearing, "an owner . . . may present witnesses in his own behalf and is entitled to cross-examine any witnesses appearing against him." (City Code § 27-9(c) at Resp. App. 59). The decision of the hearing panel is final except for any administrative rehearings. (City Code §§ 27-9(d) at Resp. App. 59, 27-14 at Resp. App. 72-73, 27-14.3 at Resp. App. 74-76). The City Code also gives a property owner an absolute right to appeal the panel decision to state district court. (Pet. App. 3; City Code § 27-9(e) at Resp. App. 59). On appeal, the state district court "considers whether the landowner's substantial rights have been prejudiced because the URSB decision violates constitutional or statutory law; exceeds URSB's authority; is based on unlawful procedure or any other error of law; is unsupported by substantial evidence; or is arbitrary or capricious or an

abuse of discretion." (Pet. App. 3-4). *See* Texas Gov't Code § 2001.174(2).

3. 2611 Meyers Street Property and First URSB Hearing Thereon

The City inspected 2611 Meyers on or about March 8, 1993. (R. vol. 2, p. 035). The structure had been fire damaged prior to Brown's purchase in 1993. (R. vol. 8, p. 81). The City's code enforcement inspector later estimated that it would cost over $84,000 to repair this building to comply with minimum city code standards, compared with only $5,434 to demolish it. (R. vol. 6, p. 28). Among the code violations noted during the inspection were rotted framing and sheetrock; no moisture resistent bath floor; absence of weather or water tight doors; rotted walkway, stairs, and railing; unpainted exposed wood; structurally unsound roof; improper sewage connections; missing water closets; and a need for all new electric service and new heating units. (R. vol. 2, p. 048, vol. 6, p. 32). The code enforcement notice of violations, detailing the violations and designating the structure a "health & safety hazard" (R. vol. 6, p. 32) and the USRB notice of a February 28, 1994 Board hearing (R. vol. 6, p. 36) respecting the property went to the then-owner of record. (R. vol. 6, p. 34). Among other things, the notice of URSB hearing (R. vol. 6, p. 36) advised the owner of record that there would be a URSB hearing at a specified date, time and place respecting the property at which evidence would be presented regarding the condition of the structure; that the owner would have an "opportunity to present evidence and witnesses if so desired"; and that any of 10 specified actions as to the property could be ordered by the Board as a result of the hearing, including

orders for repair or demolition. The notice further advised the owner that if demolition were ordered and done by the City, the owner would have to pay the demolition expenses or a lien for the expenses would be placed on the property. (*Id.*).

Freeman appeared instead of the owner of record at the URSB's February 28, 1994 hearing, stating that he had just acquired the property but had not yet "had it transferred into my name." (R. vol. 6, p. 39-40). He agreed that the property was portrayed on a slide displayed on a screen at the hearing. (R. vol. 2, p. 044). A City staff representative read the information about the property from a docket worksheet in Freeman's presence and stated that the staff recommended demolition. (R. vol. 2, p. 044). Instead of disputing any of the violations, Freeman explained under oath that he planned to repair the property but lacked funds. (R. vol. 2, p. 044; vol. 6, p. 40). He further explained in response to questions from the Board that as between his two properties, the other one (2621 Meyers Street) was "more feasible" to repair and "it is secure." (*Id.*). He therefore planned to repair the other building first. (R. vol. 6, p. 41). After display of pictures of the property (*id.*), the Board chairperson voiced doubt that repair at 2611 Meyers Street was "pragmatic" absent "funds available and a real plan of action." (*Id.*). Freeman then described his "plan" to "take the [fire damaged] top story off and make it flat and not continue with the . . . stairs." (R. vol. 6, p. 42). Not directly responding to a follow-up question as to how much repairs would cost, Freeman then testified that he hoped to get funds from the City; that an attempt to get City assistance on another project had taken three years; but that he did

have the equipment to make repairs. (R. vol. 6, p. 43). A Board member stated that he had visited the property and that he did not think the building could be salvaged. (R. vol. 6, p. 41, 42). At the hearing on the 2621 Meyers Street building later that day, Freeman affirmatively admitted that the fire-damaged structure at 2611 Meyers Street should be demolished, saying "I could see it on – on the burn out." (R. vol. 6, p. 99). Upon consideration of all the evidence, the Board panel unanimously declared the structure an "urban nuisance" and ordered, among other things, demolition within 30 days. (R. vol. 2, p. 044; vol. 6, p. 48). They issued a notice of demolition order addressed to the owner of record (R. vol. 6, p. 48), but mailed to and received by Freeman via certified mail (R. vol. 6, p. 49), and in addition, gave a notice of demolition to Freeman, who signed for it. (R. vol. 6, p. 46). After stating the Board's decision, the notice of demolition and the notice of demolition order advised Freeman of his right to seek administrative rehearing and review. (*Id.*).

4. 2621 Meyers Street Property and First URSB Hearing Thereon

The multi-unit residential apartment building at 2621 Meyers Street also was vacant and in disrepair when inspected in March and May, 1993. (R. vol. 2, p. 04-012). Notice of violations found at the inspections went to the then-owner of record. (R. vol. 6, p. 90). The City inspector estimated that it would cost $108,680 to repair the structure compared with approximately $5,434 to demolish it. (R. vol. 2, p. 08; vol. 6, p. 85-88). He certified the structure as "non-repairable" (R. vol. 2, p. 06) and a "health & safety hazard" (R. vol. 2, p. 04). Among the code

violations noted in this building upon inspection were that the building had to be secured against unauthorized entry; defective and rotted porch, stairs, posts, walls, floors, needed moisture resistent bath floor; absence of weather and water tight doors, windows, and weatherstripping; unprotected exterior surfaces; inadequate electric circuits, exposed wiring, missing or defective sinks, lavatories, toilets, showers, and baths, insufficient heating equipment, lack of permit, and defective or unconnected water heater. (R. vol. 2, p. 04).

Freeman appeared as the purported owner at the February 28, 1994 URSB hearing on 2621 Meyers Street, which followed immediately after the hearing on 2611 Meyers Street. (R. vol. 2, p. 014; vol. 6, p. 44, 98). As the actual owner of record by the time of referral to the URSB, Brown previously had received notice of the hearing. (R. vol. 6, p. 94-95). Freeman identified the property "as that portrayed on the screen" (R. vol. 2, p. 014), and testified that this property was in "better shape" than the 2611 Meyers Street building, that he lacked the funds to repair it, but had "enough material to start on what you see out there" (apparently referring to code violations depicted on the screen or in other pictures displayed at the hearing). (R. vol. 6, p. 98). Although admitting that thieves had taken substantial repair materials from the building (thus corroborating that it was not secure), he claimed to have enough to start on "one of the apartments" (R. vol. 6, p. 98-99). A Board member advised Freeman that the member had toured the property earlier that day and did not think that repair would be "feasible" (R. vol. 2, p. 014). Without disputing the existence of any violations for which the property was cited, or as depicted in pictures displayed at the hearing, Freeman

merely asked for additional time to make repairs, "[p]ossibly on a continuous – so we could discuss it at a later date." (R. vol. 6, p. 100). However, the Board unanimously found the structure to be an urban nuisance and ordered demolition within 30 days. (R. vol. 2, p. 014; vol. 6, p. 100-01, 106). Freeman again signed for the order, which advised him of his right to seek rehearing, and he and Brown received mailed copies as well. (R. vol. 6, p. 104, 106-09).

5. The Rehearings

Freeman filed a request for a rehearing on both properties. (R. vol. 6, p. 55, 111). On May 23, 1994, Freeman appeared before the URSB and again testified at both rehearings.

As to the 2621 Meyers Street order: After hearing a report that no repairs had been made, the Board nevertheless waived the rehearing fee and considered the merits of Freeman's request. (R. vol. 6, p. 114-15). When asked if he had the financial means to begin work on the apartments, Freeman answered affirmatively, but then stated only that "I have some relatives that are in the construction business who have agreed that if I can get it through the City, that they would be willing to help me." (R. vol. 6, p. 115). Freeman then showed pictures to the Board, which he claimed showed repairs he had made to the building. (*Id.*). Freeman then disputed staff's estimates of repair costs as too high, and tried to convince the Board that he could effect repairs for $2,000 per unit. (R. vol. 6, p. 115-17). However, the Chairperson characterized a list of donated materials that Freeman presented as "more like a scavenger hunt" than materials needed to

rehabilitate an apartment building, noting that there were not even enough donated toilets for the building. (R. vol. 6, p. 117). Freeman disputed the sufficiency of toilets, but admitted that he still needed more windows. (R. vol. 6, p. 117-18). After extended dialogue with Freeman, and recognizing Freeman's good intentions in hoping to repair the building, the Board concluded that Petitioners lacked the time and financial resources to make repairs, again found the structure to be an urban nuisance, and again ordered demolition within 30 days. (R. vol. 2, p. 025-026; vol. 6, p. 117-21).

At the rehearing on 2611 Meyers Street, Freeman again appeared as the sole owner's representative, still claiming to own the property himself. (R. vol. 2, p. 050, 088, 091-092). The Board again waived the rehearing fee, whereupon Freeman advised the Board that he had started to do some work on the property and produced photographs, which a Board member who had visited the property that morning, and spoken with Freeman, had requested Freeman to bring. (R. vol. 2, p. 088-089). Freeman claimed that street work done by the City had caused foundation problems in the structure, to which a Board member responded that this would not have happened had the structure been stable, and that the building was "not in very good shape." (R. vol. 2, p. 089). Freeman then showed the Board a partial list of repair materials he claimed to have obtained through donations and discount purchases, and argued for more time to pick up the "awful lot of materials" that he had not yet obtained. (R. vol. 2, p. 090). He explained that he had not yet picked up the additional needed materials because he had been concentrating on electrical repairs (*id.*); but it later became obvious that any repairs were only on the 2621

Meyers Street structure and that all Freeman claimed to have done at 2611 Meyers Street was to try to keep the property clean (R. vol. 2, p. 091), and to start repairs on one or two apartment units. (R. vol. 2, p. 093). Freeman was advised of and again disputed the staff's estimations for repair costs. (R. vol. 2, p. 090-091). At the conclusion of the evidence, the Board affirmed its prior finding of urban nuisance and again ordered demolition of the structure at 2611 Meyers Street in thirty days. (R. vol. 2, p. 051, 093).

6. The URSB Final Orders and Notices of Right to Appeal

Freeman signed for the URSB Orders of Demolition for both properties on May 23, 1994. (R. vol. 6, p. 70, 124). The May 23, 1994 orders which Freeman signed and of which he received copies, informed him of his right to appeal the URSB orders to state district court within twenty days. (R. vol. 6, p. 70, 124). Petitioners did not appeal the URSB demolition orders to state district court as to either of their buildings. (Pet. 5), The two vacant structures were demolished by City contractor, pursuant to URSB order, on or about December 27, 1994. (R. vol. 6, p. 7, 10).

ARGUMENT

A. Introduction

The Petitioners seek a radical change in Fourth Amendment law. Their Fourth Amendment argument asks for the unprecedented creation of an absolute

requirement for a judicial "seizure" warrant and abandonment of this Court's long line of precedents that assess the validity of seizures under a rule of reason. Petitioners do not now, and never have, alleged that the demolitions were factually unreasonable seizures (that the code violations did not justify demolitions of their buildings). Even though they also dispute the adequacy of the due process they received, their substantive claim is that the seizures (demolitions) were *per se* unreasonable, even if due process had been sufficient, solely because there were no judicial seizure warrants in addition to the Board orders.

Petitioners' Fourteenth Amendment procedural due process arguments are simply misplaced; predicated on the mistaken belief that they had no right to judicial review of the URSB's administrative orders.

The Petitioners have never, either at the administrative proceedings nor in this later federal court litigation, disputed that the code violations asserted by city inspectors existed in their buildings; that they had received the opportunity to repair those violations, that they lacked the funds, materials, and workers to complete such repairs; or that such violations rendered their buildings "urban nuisances," and so potentially eligible for demolition under the City's minimum urban standards policies. Rather than disputing the existence of the defects that needed repair, their strategy at the URSB proceedings was simply to stall. They never asked that any of the inspectors testify. They never sought to call other witnesses or to adduce other evidence. They never asked to see the files from which staff read and to which Board members referred during the URSB hearings. They failed to appeal to district court. In short, they waived any

procedural complaints about the fair administrative hearings that the Board conducted.

B. There was No Disregard of this Court's Precedents

1. Opinion Below Did Not Conflict With This Court's Fourth Amendment Precedents

Contrary to Petitioners' argument (Pet. 21-27), the Fifth Circuit scrupulously followed this Court's holdings that the validity of seizures under the Fourth Amendment is to be judged by the rule of reason. *See Soldal v. Cook County, Ill.*, 506 U.S. 56, 62 (1992); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 351 (1977). In addition, the en banc majority carefully considered this Court's decisions respecting the level of probable cause needed for non-criminal administrative code enforcement inspections, and applied the rationale of those decisions to the "seizures" here. (Pet. App. 15-18). *See Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967). A subsequent Fifth Circuit opinion accurately states the *Freeman* court's en banc Fourth Amendment holding: "The [*Freeman* en banc] court held that the seizure of buildings designated 'nuisances' pursuant to established and non-arbitrary police power procedures was not rendered per se unreasonable by the city's failure to obtain a warrant to enforce a demolition order." *James v. City of Dallas*, ___ F.3d ___ 2001 WL 682089, *14 n.8, Case No. 00-10556 (5th Cir. June 18, 2001). This rationale squarely follows this Court's repeated holdings that " 'reasonableness is still the ultimate standard' under the Fourth Amendment." *Soldal*, 506 U.S. at 71, *quoting Camara*, 387 U.S. at 539.

Since no decision of this Court imposes a *per se* warrant requirement for seizures – particularly seizures not involving criminal investigations, the court of appeals could not have improperly disregarded any such decision. The decisions of this Court upon which the Petitioners rely are inapposite; because they deal with warrant requirements for searches rather than seizures. Searches are fundamentally different than seizures in that an arbitrary or unlimited search involves potentially broad governmental rummaging through persons' "houses, papers, and effects." U.S. Const., amend. 4 (Pet. 1). It was the evil inherent in an arbitrary and unlimited search, the fishing expedition, more than the arbitrary seizure, that was the primary impetus for the Fourth Amendment, because searches often can be so much more intrusive than seizures and because pre-Independence Americans suffered more from over-broad searches than from warrantless seizures. *See United States v. Rabinowitz*, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting) (historical discussion). This Court has explicitly recognized this important distinction between searches, for which warrants are presumptively required absent a recognized exception, and seizures, for which warrants are but one way that a governmental agency can satisfy the requirement for reasonableness. *See G.M. Leasing Corp. v. United States, supra*, 429 U.S. at 351.

2. The Opinion Below Did Not Conflict With This Court's Procedural Due Process Precedents

Petitioners also attempt to use this Court's decision in *Honda Motors, Inc. v. Oberg*, 512 U.S. 415 (1994), to

impose burdens on the City beyond those required by the procedural due process standards of the Fourteenth Amendment, and accuse the Fifth Circuit of disregarding *Honda Motors*. (Pet. 27, 30). In *Honda Motors*, this Court addressed the total absence of any "protection against arbitrary and inaccurate adjudication" in the State of Oregon's procedures for determining punitive damages in civil trials. 512 U.S. at 430. The Court was struggling with the unique and vexing problem posed by calculation of punitive damages by a jury whose decision was insulated from effective judicial review. *Id.* Because Petitioners mistakenly believe that Texas law does not give them a right to appellate review of the URSB orders (Pet. 27-28), they treat *Honda Motors* as presenting a situation analogous to their own.

Honda Motors is not at all similar to the instant case because, as the en banc opinion below correctly held, the Petitioners had the absolute right to appeal to the Texas courts. (Pet. App. 3). The Petitioners had, but failed to exercise, an absolute right to plenary state court review of the URSB orders. City Code § 27-9(e) (Resp. App. 59); *Cedar Crest No. 10, Inc. v. City of Dallas*, 754 S.W.2d 351, 353 (Tex.App. – Eastland 1988, no writ), *cert. denied*, 490 U.S. 1081 (1989). State court judicial review of an URSB demolition order is not a "discretionary writ of certiorari proceeding" as alleged by Petitioners. (Pet. 5). The state appellate court has no discretion to refuse to review the administrative order, and the aggrieved parties have an appeal as of right from a Board demolition order. Dallas City Code § 27-9(e) (Resp. App. 59); *see also* Texas Loc. Government Code §§ 54.039 (Resp. App. 8-10) and 214.0012 (Resp. App. 18-19) (statutory rights to appeal in similar municipal demolition proceedings authorized by

general state laws). Even absent any statutory appeal provision in the City Code, or even if the City Code purported to deny any right to judicial appeal from URSB orders, persons aggrieved by municipal demolition orders in Texas have an absolute right to judicial review under the "due course of law" clause in Article I, Section 13 of the Texas Constitution (Resp. App. 5). *Nash v. City of Lubbock*, 888 S.W.2d 557, 562 (Tex.App. – Amarillo 1994, no writ). Petitioners seize on term "certiorari" (Pet. 5) because in other contexts it is associated with discretionary judicial review, and use the term inappropriately here. The sole role of the "certiorari" mechanism in appeals from URSB orders is that certiorari is the writ that the state district court uses to order the URSB to produce the administrative record and the reasons for the administrative decision. *See, e.g.*, Tex. Loc. Gov't Code §§ 54.039(b)-(e) (Resp. App. 9), 214.0012(b)-(e) (Resp. App. 18-19); *Nussbaum v. City of Dallas*, 948 S.W.2d 305, 308 (Tex.App. – Dallas 1996, no writ).

Moreover, Texas state court review would not have been "limited" (Pet. 5) had Petitioners appealed. Their appeal would have provided full consideration of any litigable constitutional issues that they might have raised. Under the "substantial evidence" standard of review applicable here, Texas state courts fully determine federal constitutional claims as well as the sufficiency of the evidence in appeals from administrative orders. *See* Tex. Gov't Code § 2001.174 ("substantial evidence" review of state agency decisions includes substantive and procedural constitutional issues); *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996), *cert. denied*, 519 U.S. 1156 (1997) (considering substantive due process claims in "substantial evidence" appeal from city personnel

action); *Cedar Crest No. 10, Inc. v. City of Dallas, supra* (considering substantive and procedural due process claims on "substantial evidence" appeal from Dallas demolition order). The Petitioners cite no cases identifying any constitutional right to *de novo* trial on appeal from an adverse administrative decision and there are none.

Petitioners admit that *Honda Motors* does not hold that administrative procedures cannot provide adequate due process (Pet. 29). *Honda Motors* only views as suspect changes from traditional common law procedures that deprive a party of adequate protections against deprivation of property or liberty. 512 U.S. at 430. Petitioners can only argue that that happened here by maintaining their mistaken belief that they had no right to judicial review.

In addition, Petitioners mistakenly rely on *Crossman v. City of Galveston*, 247 S.W. 810 (Tex. 1923), and other Texas state court cases for the proposition that Texas common law barred city demolitions of nuisances except through court actions to abate nuisance. (Pet. 18, 19, 28). They read *Crossman* incorrectly, so that their attempt to use *Crossman* to render *Honda Motors* applicable to this case must fail. *Crossman* rejected on due process grounds the demolition of a building as a nuisance via municipal order "in the absence of any general laws either of the city or of the state." 247 S.W. at 813. Here, by contrast, Texas' state constitution and the general city laws contained in Dallas' charter and city code all expressly authorize the Board actions here challenged. The City created the URSB and the program it administers pursuant to the City's powers as a Texas "home rule" city to take virtually any measures respecting local problems that do not conflict with state laws. *See* Texas Const. art. 11, § 5 at Resp. App. 5; City Charter ch. I, § 1 at Resp.

App. 23, ch. II, § 1(16), (18), (24), (28), and (31) at Resp. App. 24-28, ch. II, § 2 at Resp. App. 34, Ch. XV, § 2 at Resp. App. 36; City Code ch. 27 *passim* at Resp. App. 41 *et seq.* The only other relevant procedural due process objection that the *Crossman* court had to the administratively-ordered demolition there was that the Galveston City Council's determination of nuisance was final. 247 S.W. at 813. Here by contrast, as demonstrated above, Petitioners had the right to appeal to state district court. City Code § 27-9(e) (Resp. App. 59). Thus the most recent Texas state appellate opinion on point, not cited by Petitioners, upheld the City of Dallas' URSB program against a due process challenge that asserted that the right to appeal Board demolition orders under City Code § 27-9(e) was too limited. This opinion correctly distinguished the Texas Supreme Court cases upon which Petitioners now rely (Pet. 28 n.13 and accompanying text) upon the grounds that those cases involved situations without the right to judicial review. *See Cedar Crest No. 10, Inc. v. City of Dallas, supra,* 754 S.W.2d at 353.

C. The Opinion Below Created No Conflict Among the Circuit Courts

Petitioners point to no opinions of other circuits conflicting with the opinion below on procedural due process issues. However, on the Fourth Amendment question, they assert that the opinion below conflicts with opinions in two other circuits: *Conner v. City of Santa Ana,* 897 F.2d 1487 (9th Cir.), *cert. denied,* 498 U.S. 816 (1990) (Pet. 15-16) and *Hroch v. City of Omaha,* 4 F.3d 693 (8th Cir. 1993). (Pet. 17). Contrary to Petitioners' contentions, there is no divergence among the circuits as to whether a

warrant is necessary to execute an administrative order to demolish a building, where the order is issued after notice, hearing, and the opportunity for judicial appeal: The Fifth Circuit and the Eight Circuit opinions hold that no warrant is required, while the Ninth Circuit has not yet squarely addressed the question.

The Fifth Circuit's decision is the en banc opinion below. The Ninth Circuit decision, *Conner*, did require a judicial warrant for breaking down a fence to enter an occupied residential property within an "enclosed, fenced yard" to seize junk automobiles. 897 F.2d at 1491. Nevertheless, the Ninth Circuit recognized that prior procedural protections, including "numerous hearings and appeals," *id.* at 1490, "established . . . the validity of the seizure." *Id.* at 1491. It was the entry into the private fenced residential property (the search for the cars) that the Ninth Circuit held to trigger the need for a warrant. *Id.* at 1491-92. Only the assertedly unlawful entry into fenced, occupied, residential property rendered the subsequent warrantless seizures unlawful according to the Ninth Circuit. *Id.* at 1492. If read as Petitioners would have it, to require a warrant to execute an administrative order to seize personal property that was not located in fenced private land, *Conner* would be contrary to *G.M. Leasing, supra,* 429 U.S. at 351 (permitting warrantless seizures of vehicles from property where the seizures "did not involve any invasion of privacy"). In *Conner*, the administrative order purported to authorize entry by breaking down a fence and entering into the yard of an occupied residence, whereas here, the buildings were vacant and there is no indication that they were fenced. *Conner* does not hold that the absentee owners of a vacant and dilapidated building have any right to a judicial

warrant before execution of an administrative demolition warrant. The Eighth Circuit's *Hroch* decision recognized most of these factors, when it distinguished *Hroch* from *Conner* on the facts. 4 F.3d at 696-97.

Indeed, *Hroch*, although relied on by Petitioners, actually supports the City and is entirely consistent with the Fifth Circuit's en banc opinion below. *Hroch* upheld an administratively-ordered seizure against a Fourth Amendment challenge on the grounds that the property owner's right to seek judicial review of the seizure order "provide[d] a constitutionally adequate substitute for a warrant." 4 F.3d at 696-97, *quoting Donovan v. Dewey*, 452 U.S. 594, 603 (1981). Petitioners here also had the right to judicial review. They simply chose not to appeal. As a subsequent Eight Circuit opinion explicitly recognizes, *Hroch* stands for the same proposition as does the en banc Fifth Circuit opinion here: administrative seizure orders, issued after procedural safeguards that are sufficient to satisfy the Fourteenth Amendment, also will normally be found reasonable, and hence sufficient, under the Fourth Amendment. *See Samuels v. Meriwether*, 94 F.3d 1163, 1167 (8th Cir. 1996).

D. The Court of Appeals Correctly Decided This Case

1. The "Seizures" of Petitioners' Abandoned Buildings Pursuant to Administrative Demolition Orders Were Reasonable Under the Facts of this Case, and Thus Permissible under the Fourth Amendment

Execution of the URSB orders in this case without a judicial warrant was reasonable for Fourth Amendment

purposes because this course of action struck the appropriate balance between competing private and government interests. *See Johnson v. United States*, 333 U.S. 10, 14-15 (1948). Upon such considerations, in *Florida v. White*, 526 U.S. 559 (1999), this Court approved a warrantless seizure of a contraband automobile that was in plain view in a public place. *See also, G.M. Leasing Corp. v. United States, supra*, 429 U.S. at 351 (no warrant needed for seizures of vehicles from property where the seizures "did not involve any invasion of privacy"). Here, no plain view or other warrant exception was required, because the URSB demolition orders expressly authorized demolition, the Petitioners had already received more procedural rights than they would have obtained from the City's *ex parte* presentation to a magistrate, the Petitioners failed to exercise the right to appeal, and the City had a strong interest in enforcing its minimum housing standards in an efficient manner, and in protecting the public from hazardous buildings. By contrast, the Petitioners' intended commercial use of the buildings provided them only with a diminished expectation of privacy compared to that of an in-residence homeowner. *See New York v. Burger*, 482 U.S. 691, 700 (1987) ("An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."). Nothing could be more reasonable than implementation of a legislatively authorized administrative order, issued after adequate notice and hearing, as to which the aggrieved parties had, but failed to exercise, their absolute right to appeal.

The Petitioners could not possibly reasonably have believed, having participated in hearings, been served with the URSB orders, and been advised of their rights to

appeal, that their buildings would remain standing or that their properties would remain free of liens. Since any expectations to that effect were unreasonable, the implementation of the URSB orders was valid under the Fourth Amendment. *Oliver v. United States*, 466 U.S. 170, 177 (1984).

Moreover, the URSB as a quasi-judicial body was the functional equivalent of a neutral and detached magistrate for Fourth Amendment purposes – so that the URSB orders satisfied any requirement for a warrant here. A magistrate for the purposes of issuing arrest warrants under the Fourth Amendment need not be a judge. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972) (reserving the question of whether a magistrate needs to work under judicial supervision); *see Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972) (mayor's direct interest in finances, not executive status, could disqualify him as judge); *Dugan v. Ohio*, 277 U.S. 61 (1928) (mayor with limited financial duties qualified to be a judge because no direct interest in collection of fines); *Tumey v. Ohio*, 273 U.S. 510, 534 (1927) (union of executive and judicial power does not necessarily violate due process). The URSB has no duties that would interfere with its impartiality. City Code, ch. 27 (Resp. App. 41 *et seq.*). Texas has explicitly vested municipal boards similar to the URSB with quasi-judicial powers. Subchapter C of Tex. Loc. Gov't Code Title 2, Subtitle D, Chapter 54 (§§ 54.032-54.043, entitled"Quasi-Judicial Enforcement of Health and Safety Ordinances") (Excerpts at Resp. App. 8-9). The Fifth Circuit recognizes the URSB as exercising "quasi-judicial" powers. (Pet. App. 24). The Petitioners enjoyed more due process rights before the URSB than

they ever could have obtained through an *ex parte* presentment to a judge of a warrant application. Moreover, the Fourth Amendment clearly was not originally intended to reflect hostility to fair administrative procedures – it was directed against arbitrary action. Just as the drafters of what is now codified as 42 U.S.C. § 1983 could not have predicted the modern reliance on administrative remedies ("We also see no reason to suppose that Congress, in enacting the Reconstruction civil rights statutes, wished to foreclose the adaptation of traditional principles of preclusion to such subsequent developments as the burgeoning use of administrative adjudication in the 20th century." *University of Tennessee v. Elliott*, 478 U.S. 788, 797 (1986), *accord Allen v. McCurry*, 449 U.S. 90, 98-101 (1980)); those who drafted and ratified the Fourth Amendment more than a century before administrative adjudications became common practice, could not have intended to place limits on procedurally fair administrative adjudications.

2. Petitioners Received Adequate Procedural Due Process Under the Facts of This Case

The reinstated majority panel opinion respecting due process (Pet. App. 65-69), properly rejected Petitioners' claims that they did not receive an adequate opportunity to be heard (Pet. App. 66-68) and correctly ruled that they were not deprived of due process when they did not receive an additional hearing on the amount of demolition expenses because their opportunity to do the demolition work themselves sufficiently protected them against exorbitant demolition costs, and "[a] hearing on costs

before the demolition could have done no more." (Pet. App. 69).

The record supports the court of appeals' panel and en banc conclusions that Petitioners had ample notice and opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-15 (1950) (notice); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (opportunity to be heard). Petitioners complain that they may not have received notice of all violations for which the property was cited (Pet. 9), but notice of violations went to the then-owners of record. (R. vol. 2, p. 04-05, 035).[2] Besides, Freeman was very familiar with the state of the properties from working on and cleaning them. (*See* R. vol. 8, p. 58-59, 60-62, 81-82, 86-88). His testimony at four hearings and at the district court trial clearly demonstrates his awareness of the repairs that inspectors were requiring. Petitioners also complain about *"ex parte"* communications between staff and Board members, and members' visits to the properties. (Pet. 8-9). However, they allege no specific prejudice from those alleged events, and cite no

---

[2] On February 28, 1994, Freeman falsely told the URSB that he was the lawful owner of both properties, but that he transferred one to Brown's name. (R. vol. 6, p. 99-100). Again, on May 23, 1994, Freeman told the URSB that he was the actual owner of the two properties. (R. vol. 6, p. 64-65). In fact, he only acquired a .1% interest in the properties from Brown in August, 1994. (R. vol. 6, p. 79-80, 133-34). Any failure to serve Freeman with notices of inspection violations that were sent to the owners of record shortly after the inspections obviously was caused by the Board's reliance on Freeman's misrepresentations. Had Freeman not been intimately familiar with the structures, or had he desired additional copies of the notices or other documents consulted at the hearings, he simply could have asked to see them. He did not.

authority for the proposition that due process prohibits them. The court of appeals carefully considered these complaints and correctly determined that under the specific facts here presented these occurrences did not deprive Petitioners of procedural due process. (Pet. App. 66-68).

Petitioners also continue mistakenly to insist that they had no right to appeal from the URSB orders. (Pet. 5). However, as demonstrated above, Petitioners had the absolute right to judicial appeal.

Petitioners also erroneously assert that Texas law prevented them from obtaining a stay pending appeal (Pet. 6), relying on Texas Local Government Code §§ 54.039(e) (Resp. App. 9) and 214.0012(e) (Resp. App. 19) for that proposition. However, those laws do not apply because the City has not implemented the relevant portions of chapters 54 or 214 of the Local Government Code. *See* Tex. Loc. Gov't Code §§ 54.031 (Resp. App. 8), 214.001(a) (Resp. App. 10). Even if §§ 54.039(e) and 214.0012(e) applied here, those provisions merely state that the appeal "does not stay proceedings on the decision appealed from." (Resp. App. 9). This is similar to the procedure in many appeals. There may be no automatic stay, but nothing prevents an appellant from moving for a stay pending appeal under general equitable principles. *See, e.g.*, S. Ct. R. 23; Fed. R. App. P. 8. In Texas, those equitable principles are codified in statutes and rules of civil procedure. *See* Tex. Civ. Prac. & Rem. Code §§ 65.001 (Resp. App. 7) (application of equity principles), 65.011 (Resp. App. 7-8) (grounds for injunction); Tex. R. Civ. P. 680 (Resp. App. 20-21) (temporary restraining order).

Contrary to Petitioners' insinuations, the term "urban nuisance" as defined by City Code § 27-3(23) (Resp. App.

17), is neither vague nor subjective, and does not permit demolition upon merely aesthetic considerations as Petitioners imply. (Pet. 11). The en banc majority opinion below correctly recognized that the definition was clear, concrete, specific, and objective. *Freeman v. City of Dallas*, n. 2 (Pet. App. 5); *accord Criswell v. City of Dallas, Texas*, 2001 WL 609480, *5, Civ. Case No. 3:00-CV-0687-G (N.D. Tex. May 29, 2001) (unpublished).[3] Under the City Code definition, before a structure can be classified as an "urban nuisance" (and thus considered for an order of repair or demolition under City Code § 27-13 (Resp. App. 67)), the structure must either be "dangerous" within the meaning of City Code § 27-3(23)(A) (Resp. App. 47) or fail to meet the standards of City Code § 27-3(23)(B) (Resp. App. 47) by reason of violating at least two of the 31 "Minimum Standards" for structural soundness, utilities, and health enumerated in City Code § 27-11 (Resp. App.

---

[3] The *Criswell* court stated:

> Section 27-11, referenced in the definition of an urban nuisance, is comprised of no less than 31 separately delineated property, structural, utility, and health standards. Dallas, Tex. Rev. City Code, Art. III, 27-11(a)-(d). These 31 standards are extremely detailed, going so far as to specify a minimum temperature for the hot water supplied by the water heater and the size of the masonry support dowels for the foundation. Dallas, Tex. Rev. City Code, Art. III, 27-11(c)(4), 27-11(b)(2). . . . Pursuant to its own review of the detailed nuisance standards contained in Chapter 27 and in accordance with the Fifth Circuit's findings on the same issue, this court concludes that the definition of an "urban nuisance" is not unconstitutionally vague.

Criswell v. City of Dallas, Texas, 2001 WL 609480, *5.

60-65). None of those standards relate merely to cosmetic appearances or would permit demolition if a structure were merely subjectively "offensive or annoying" as alleged by Petitioners. (Pet. 11). All of these "Minimum Standards" address substantial concerns of public health, safety, fitness for residence, or structural integrity. Only if violations of these "Minimum Standards" are the cause for the structure being objectively "substantially offensive and annoying to persons of ordinary sensibilities, tastes, and habits living in the community." City Code § 27-3(23)(B) (Resp. App. 47), will the "offensive or annoying" condition make the structure an "urban nuisance." Despite the Petitioners' contrary argument (Pet. 11), the Board has no power to demolish a building merely because board members find it "annoying" or "offensive."

CONCLUSION

The Petitioners' grounds for review being without merit, and there being no additional grounds warranting review, the Petition for a writ of certiorari in this fact-intensive case should be denied.

Respectfully submitted,

PETER B. HASKEL
Assistant City Attorney
Counsel of Record
OFFICE OF THE DALLAS CITY ATTORNEY
1500 Marilla, 7/b/north
Dallas TX 75201
(214) 670-3519
(214) 670-0622 (FAX)

Attorney for City of Dallas, Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES FREEMAN and ROSALYN BROWN, Plaintiffs, v. CITY OF DALLAS, Defendant.	)	Case No. 3-96-CV-1108-DES

MEMORANDUM AND ORDER

(Filed Oct. 9, 1997)

This matter is before the court on plaintiff's Motion to Alter or Amend Judgment (Doc. 60).

Fed. R. Civ. P. 59(e) allows for motions to alter or amend judgment if filed within ten days after entry of the judgment. The purpose of Fed. R. Civ. P. 59(e) is "to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. International Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (quoting *Keene Corp. v. International Fidelity Insurance Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982), *aff'd.*, 735 F.2d 1367 (7th Cir. 1984)). Because Fed. R. Civ. P. 59(e) does not list specific grounds to alter or amend judgments, a district court has considerable discretion in deciding whether to grant the motion. 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2810.1 (citing *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 355 (5th Cir. 1993)). Factors a district court may consider include: (1) whether the judgment is based upon a manifest error

of law or fact; (2) the existence of newly discovered or previously unavailable evidence; (3) whether reconsideration is necessary to prevent manifest injustice; or (4) an intervening change in controlling law. *Id.* Reconsideration of a judgment, however, is an extraordinary remedy which should be used sparingly. *Id.* Fed. R. Civ. P. 59(e) motions should not be used to relitigate old matters, raise new arguments, or present evidence that could have been raised prior to entry of the judgment. *Id.*

Plaintiffs move the court to alter or amend its August 13, 1997 judgment in which the court disallowed prejudgment interest and declined to enjoin the City of Dallas ("City") from maintaining a lien on plaintiffs' property to recover the costs of demolition. Plaintiffs contend that plaintiffs' counsel misstated the law governing the award of prejudgment interest in their motion for judgment. Plaintiffs point out that state law governs the award of prejudgment interest in 42 U.S.C. § 1983 actions, and argue that Texas law provides that judgments in property damage cases must include prejudgment interest. Plaintiffs also contend that the court erred by allowing the lien to stand because it requires the plaintiffs "to pay for the unconstitutional demolition" or hold the land with a cloud on the title.

As an initial matter, the court notes that plaintiffs are advancing arguments that could have been raised before entry of judgment. Motions to alter or amend a judgment, however, "cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (quoting *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986)). Accordingly, plaintiffs'

arguments are not proper grounds to alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e).

On their merits, plaintiffs' arguments are also unhelpful. As to plaintiffs' first argument, the court disagrees that Texas law requires an award of prejudgment interest under the circumstances of the present case. Plaintiffs' second argument appears to be incorrectly premised on the idea that the court determined the demolition itself to have been unconstitutional. The court did not question the City's ultimate right to demolish property found to be a nuisance by the City Urban Rehabilitation Standards Board. The court merely found that the Fourth Amendment required the City to obtain a warrant before effectuating such demolition.

IT IS THEREFORE BY THE COURT ORDERED that plaintiff's Motion to Alter or Amend Judgment (Doc. 60) is denied.

Dated this 7 day of October, 1997, at Topeka, Kansas.

/s/ Dale E. Saffels
DALE E. SAFFELS
United States
District Judge

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. LOCAL RULE 41.3

5TH CIR. R. 41 ISSUANCE OF MANDATE; STAY OF MANDATE

* * *

41.3 Effect of Granting Rehearing En Banc. Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate.

CONSTITUTION OF THE STATE OF TEXAS,
ARTICLE 1, SECTION 13,

TEXAS CONSTITUTION
ARTICLE 1. BILL OF RIGHTS

SECTION 13. Excessive bail or fines; cruel and unusual punishment; remedy by due course of law. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

CONSTITUTION OF THE STATE OF TEXAS,
ARTICLE 11, SECTION 5

TEXAS CONSTITUTION
Article 11 – MUNICIPAL CORPORATIONS

Section 5 – Cities of more than 5,000 population; adoption or amendment of charters; taxes; debt restrictions

Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters. If the number of inhabitants of cities that have adopted or amended their charters under this section is reduced to five thousand (5000) or fewer, the cities still

may amend their charters by a majority vote of the qualified voters of said city at an election held for that purpose. The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State. Said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent thereon. Furthermore, no city charter shall be altered, amended or repealed oftener than every two years.

TEXAS CIVIL PRACTICE & REMEDIES CODE,
SECTION 65.001.

TEXAS CIVIL PRACTICE & REMEDIES CODE
CHAPTER 65. INJUNCTION
SUBCHAPTER A. GENERAL PROVISIONS
§ 65.001. Application of Equity Principles.

The principles governing courts of equity govern injunction proceedings if not in conflict with this chapter or other law.

TEXAS CIVIL PRACTICE & REMEDIES CODE,
SECTION 65.011

TEXAS CIVIL PRACTICE & REMEDIES CODE
CHAPTER 65. INJUNCTION
SUBCHAPTER B. AVAILABILITY OF REMEDY
§ 65.011. Grounds Generally

A writ of injunction may be granted if:

(1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant;

(2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual;

(3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions;

(4) a cloud would be placed on the title of real property being sold under an execution against a party having no interest in the real property subject to execution at the time of sale, irrespective of any remedy at law; or

(5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

TEXAS LOCAL GOVERNMENT CODE,
SECTIONS 54.031 AND 54.039

TEXAS LOCAL GOVERNMENT CODE
CHAPTER 54. ENFORCEMENT OF MUNICIPAL ORDINANCES
SUBCHAPTER C. QUASI – JUDICIAL ENFORCEMENT OF HEALTH AND SAFETY ORDINANCES

§ 54.031. Subchapter Applicable to Certain Municipalities

This subchapter applies to a municipality that by ordinance implements the subchapter.

---

§ 54.039. Judicial Review

(a) Any owner, lienholder, or mortgagee of record jointly or severally aggrieved by any decision of a commission panel may present a petition to a district court, duly verified, setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. The petition must be presented to the court within

30 calendar days after the date a copy of the final decision of the commission panel is mailed by first class mail, certified return receipt requested, to all persons to whom notice is required to be sent under Section 54.035. The commission panel shall mail that copy promptly after the decision becomes final. In addition, an abbreviated copy of the order shall be published one time in a newspaper of general circulation in the municipality within 10 calendar days after the date of the mailing of the copy as provided by this subsection, including the street address or legal description of the property; the date of the hearing, a brief statement indicating the results of the order, and instructions stating where a complete copy of the order may be obtained, and a copy shall be filed in the office of the municipal secretary or clerk.

(b) On presentation of the petition, the court may allow a writ of certiorari directed to the commission panel to review the decision of the commission panel and shall prescribe in the writ the time, which may not be less than 10 days, within which a return on the writ must be made and served on the relator or the relator's attorney.

(c) The commission panel may not be required to return the original papers acted on by it. It is sufficient for the commission panel to return certified or sworn copies of the papers or of parts of the papers as may be called for by the writ.

(d) The return must concisely set forth other facts as may be pertinent and material to show the grounds for the decision appealed from and shall be verified.

(e) The allowance of the writ does not stay proceedings on the decision appealed from.

(f) The district court's review shall be limited to a hearing under the substantial evidence rule. The court may reverse or affirm, in whole or in part, or may modify the decision brought up for review.

(g) Costs may not be allowed against the commission panel.

(h) If the decision of the commission panel is affirmed or not substantially reversed but only modified, the district court shall allow to the municipality all attorney's fees and other costs and expenses incurred by it and shall enter a judgment for those items, which may be entered against the property owners as well as all persons found to be in occupation of the property subject to the proceedings before the commission panel.

Texas Local Government Code, Sections 214.001 and 214.0012

TITLE 7. REGULATION OF LAND USE, STRUCTURES, BUSINESSES, AND RELATED ACTIVITIES
CHAPTER 214. MUNICIPAL REGULATION OF STRUCTURES
§ 214.001. Authority Regarding Substandard Building

(a) A municipality may, by ordinance, require the vacation, relocation of occupants, securing, repair, removal, or demolition of a building that is:

(1) dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare;

(2) regardless of its structural condition, unoccupied by its owners, lessees, or other invitees and is unsecured from unauthorized entry to the extent that it could be entered or used by vagrants or other uninvited persons as a place of harborage or could be entered or used by children; or

(3) boarded up, fenced, or otherwise secured in any manner if:

(A) the building constitutes a danger to the public even though secured from entry; or

(B) the means used to secure the building are inadequate to prevent unauthorized entry or use of the building in the manner described by Subdivision (2).

(b) The ordinance must:

(1) establish minimum standards for the continued use and occupancy of all buildings regardless of the date of their construction;

(2) provide for giving proper notice to the owner of a building; and

(3) provide for a public hearing to determine whether a building complies with the standards set out in the ordinance.

(c) A notice of a hearing sent to an owner, lienholder, or mortgagee under this section must include a statement that the owner, lienholder, or mortgagee will be required to submit at the hearing proof of the scope of any work that may be required to comply with the ordinance and the time it will take to reasonably perform the work.

(d) After the public hearing, if a building is found in violation of standards set out in the ordinance, the municipality may order that the building be vacated, secured, repaired, removed, or demolished by the owner within a reasonable time as provided by this section. The municipality also may order that the occupants be relocated within a reasonable time. If the owner does not take the ordered action within the allotted time, the municipality shall make a diligent effort to discover each mortgagee and lienholder having an interest in the building or in the property on which the building is located. The municipality shall send to each identified mortgagee and lienholder a notice containing:

(1) an identification, which is not required to be a legal description, of the building and the property on which it is located;

(2) a description of the violation of municipal standards that is present at the building; and

(3) a statement that the municipality will vacate, secure, remove, or demolish the building or relocate the occupants of the building if the ordered action is not taken within a reasonable time.

(e) As an alternative to the procedure prescribed by Subsection (d), the municipality may make a diligent effort to discover each mortgagee and lienholder before conducting the public hearing and may give them a notice of and an opportunity to comment at the hearing. In addition, the municipality may file notice of the hearing in the Official Public Records of Real Property in the county in which the property is located. The notice must contain the name and address of the owner of the affected

property if that information can be determined, a legal description of the affected property, and a description of the hearing. The filing of the notice is binding on subsequent grantees, lienholders, or other transferees of an interest in the property who acquire such interest after the filing of the notice, and constitutes notice of the hearing on any subsequent recipient of any interest in the property who acquires such interest after the filing of the notice. If the municipality operates under this subsection, the order issued by the municipality may specify a reasonable time as provided by this section for the building to be vacated, secured, repaired, removed, or demolished by the owner or for the occupants to be relocated by the owner and an additional reasonable time as provided by this section for the ordered action to be taken by any of the mortgagees or lienholders in the event the owner fails to comply with the order within the time provided for action by the owner. Under this subsection, the municipality is not required to furnish any notice to a mortgagee or lienholder other than a copy of the order in the event the owner fails to timely take the ordered action.

(f) Within 10 days after the date that the order is issued, the municipality shall:

(1) file a copy of the order in the office of the municipal secretary or clerk; and

(2) publish in a newspaper of general circulation in the municipality in which the building is located a notice containing:

(A) the street address or legal description of the property;

(B) the date of the hearing;

(C) a brief statement indicating the results of the order; and

(D) instructions stating where a complete copy of the order may be obtained.

(g) After the hearing, the municipality shall promptly mail by certified mail, return receipt requested, a copy of the order to the owner of the building and to any lienholder or mortgagee of the building. The municipality shall use its best efforts to determine the identity and address of any owner, lienholder, or mortgagee of the building. If a notice is mailed according to this subsection and the United States Postal Service returns the notice as "refused" or "unclaimed," the validity of the notice is not affected, and the notice shall be deemed as delivered.

(h) In conducting a hearing authorized under this section, the municipality shall require the owner, lienholder, or mortgagee of the building to within 30 days:

(1) secure the building from unauthorized entry; or

(2) repair, remove, or demolish the building, unless the owner or lienholder establishes at the hearing that the work cannot reasonably be performed within 30 days.

(i) If the municipality allows the owner, lienholder, or mortgagee more than 30 days to repair, remove, or demolish the building, the municipality shall establish specific time schedules for the commencement and performance of the work and shall require the owner, lienholder, or mortgagee to secure the property in a

reasonable manner from unauthorized entry while the work is being performed, as determined by the hearing official.

(j) A municipality may not allow the owner, lienholder, or mortgagee more than 90 days to repair, remove, or demolish the building or fully perform all work required to comply with the order unless the owner, lienholder, or mortgagee:

(1) submits a detailed plan and time schedule for the work at the hearing; and

(2) establishes at the hearing that the work cannot reasonably be completed within 90 days because of the scope and complexity of the work.

(k) If the municipality allows the owner, lienholder, or mortgagee more than 90 days to complete any part of the work required to repair, remove, or demolish the building, the municipality shall require the owner, lienholder, or mortgagee to regularly submit progress reports to the municipality to demonstrate compliance with the time schedules established for commencement and performance of the work. The order may require that the owner, lienholder, or mortgagee appear before the hearing official or the hearing official's designee to demonstrate compliance with the time schedules. If the owner, lienholder, or mortgagee owns property, including structures or improvements on property, within the municipal boundaries that exceeds $100,000 in total value, the municipality may require the owner, lienholder, or mortgagee to post a cash or surety bond in an amount adequate to cover the cost of repairing, removing, or demolishing a building under this subsection. In lieu of a

bond, the municipality may require the owner, lienholder, or mortgagee to provide a letter of credit from a financial institution or a guaranty from a third party approved by the municipality. The bond must be posted, or the letter of credit or third party guaranty provided, not later than the 30th day after the date the municipality issues the order.

(l) In a public hearing to determine whether a building complies with the standards set out in an ordinance adopted under this section, the owner, lienholder, or mortgagee has the burden of proof to demonstrate the scope of any work that may be required to comply with the ordinance and the time it will take to reasonably perform the work.

(m) If the building is not vacated, secured, repaired, removed, or demolished, or the occupants are not relocated within the allotted time, the municipality may vacate, secure, remove, or demolish the building or relocate the occupants at its own expense. This subsection does not limit the ability of a municipality to collect on a bond or other financial guaranty that may be required by Subsection (k).

(n) If a municipality incurs expenses under Subsection (m), the municipality may assess the expenses on, and the municipality has a lien against, unless it is a homestead as protected by the Texas Constitution, the property on which the building was located. The lien is extinguished if the property owner or another person having an interest in the legal title to the property reimburses the municipality for the expenses. The lien arises and attaches to the property at the time the notice of the

lien is recorded and indexed in the office of the county clerk in the county in which the property is located. The notice must contain the name and address of the owner if that information can be determined with a reasonable effort, a legal description of the real property on which the building was located, the amount of expenses incurred by the municipality, and the balance due.

(o) If the notice is given and the opportunity to relocate the tenants of the building or to repair, remove, or demolish the building is afforded to each mortgagee and lienholder as authorized by Subsection (d), (e), or (g), the lien is a privileged lien subordinate only to tax liens.

(p) A hearing under this section may be held by a civil municipal court.

(q) A municipality satisfies the requirements of this section to make a diligent effort, to use its best efforts, or to make a reasonable effort to determine the identity and address of an owner, a lienholder, or a mortgagee if the municipality searches the following records:

(1) county real property records of the county in which the building is located;

(2) appraisal district records of the appraisal district in which the building is located;

(3) records of the secretary of state;

(4) assumed name records of the county in which the building is located;

(5) tax records of the municipality; and

(6) utility records of the municipality.

TEXAS LOCAL GOVERNMENT CODE
TITLE 7. REGULATION OF LAND USE, STRUCTURES, BUSINESSES, AND RELATED ACTIVITIES
CHAPTER 214. MUNICIPAL REGULATION OF STRUCTURES
§ 214.0012. Judicial Review

(a) Any owner, lienholder, or mortgagee of record of property jointly or severally aggrieved by an order of a municipality issued under Section 214.001 may file in district court a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. The petition must be filed by an owner, lienholder, or mortgagee within 30 calendar days after the respective dates a copy of the final decision of the municipality is mailed to them by first class mail, certified return receipt requested, or such decision shall become final as to each of them upon the expiration of each such 30 calendar day period.

(b) On the filing of the petition, the court may issue a writ of certiorari directed to the municipality to review the order of the municipality and shall prescribe in the writ the time within which a return on the writ must be made, which must be longer than 10 days, and served on the relator or the relator's attorney.

(c) The municipality may not be required to return the original papers acted on by it, but it is sufficient for the municipality to return certified or sworn copies of the papers or of parts of the papers as may be called for by the writ.

(d) The return must concisely set forth other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

(e) The issuance of the writ does not stay proceedings on the decision appealed from.

(f) Appeal in the district court shall be limited to a hearing under the substantial evidence rule. The court may reverse or affirm, in whole or in part, or may modify the decision brought up for review.

(g) Costs may not be allowed against the municipality.

(h) If the decision of the municipality is affirmed or not substantially reversed but only modified, the district court shall allow to the municipality all attorney's fees and other costs and expenses incurred by it and shall enter a judgment for those items, which may be entered against the property owners, lienholders, or mortgagees as well as all persons subject to the proceedings before the municipality.

PART II. RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS
SECTION 5. INJUNCTIONS
RULE 680. TEMPORARY RESTRAINING ORDER

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state Why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after signing, not to exceed fourteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do

so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought.

CHARTER

city of

DALLAS, TEXAS

[LOGO]

CHARTER

of

THE CITY OF DALLAS, TEXAS

Ch.	I.	Incorporation and Territory, §§ 1 - 3
Ch.	II.	Powers of the City, §§ 1 - 2
Ch.	III.	City Council, §§ 1 - 20
Ch.	IIIA.	City Secretary, §§ 1 - 3
Ch.	IV.	Elections and Referendums, §§ 1 - 11
Ch.	V.	Recall of Councilmen, §§ 1 - 2
Ch.	VI.	The City Manager, §§ 1 - 2
Ch.	VII.	Legal Department, §§ 1 - 3
Ch.	VIII.	Municipal Courts, §§ 1 - 9
Ch.	IX.	City Auditor, §§ 1 - 3
Ch.	IXA.	Reserved
Ch.	X.	Administrative Departments, §§ 1 - 4
Ch.	XI.	The Budget and Financial Procedure Relating Thereto, §§ 1 - 14
Ch.	XII.	Police Department, §§ 1 - 8
Ch.	XIII.	Fire Department, §§ 1 - 9
Ch.	XIV.	Franchises, §§ 1 - 11
Ch.	XV.	Planning and Zoning, §§ 1 - 7
Ch.	XVI.	Civil Service and Personnel, §§ 1 - 17
Ch.	XVII.	Park and Recreation Department, §§ 1 - 10
Ch.	XVIII.	Ordinances and Resolutions, §§ 1 - 16
Ch.	XIX.	Assessment and Collection of Texas, §§ 1 - 29
Ch.	XX.	Public Improvement and Assessments, §§ 1 - 12
Ch.	XXI.	Borrowing Money, §§ 1 - 12

Ch. XXII. Public Contracts, §§ 1 - 12
Ch. XXIII. Claims For Damages Or Injury, §§ 1 - 6
Ch. XXIV. Miscellaneous Provisions, §§ 1 - 21 [A]

CHAPTER I. INCORPORATION AND TERRITORY

SEC. 1. CORPORATION NAME.

All inhabitants of the City of Dallas, Dallas County, Texas, as the boundaries and limits of said city are herein established or may hereafter be established, shall be a body politic, incorporated under, and to be known by, the name and style of the "City of Dallas," with such powers, rights and duties as herein provided.

SEC. 2. BOUNDARIES.

The bounds and limits of the City of Dallas shall be those as established and described in ordinances duly passed by the city council of the City of Dallas in accordance with state law. The city secretary shall at all times keep a correct and complete description with recent annexation or disannexations. (Amend. of 6-12-73, Prop. No. 1; Amend. of 4-2-83, Prop. No. 3)

SEC. 3. ADDITIONAL TERRITORY.

The city may from time to time alter its boundaries by annexing any territory adjoining its present or future boundaries in any size or shape desired in any manner provided by state law. In addition thereto, the city may annex additional territory lying adjacent to the city with or without the consent of the territory and the inhabitants of the territory annexed where the same is not inconsistent with the state law. Such annexations shall be accomplished by ordinance providing for the alteration and extension of the boundary limits, which ordinance shall

describe the territory to be annexed and shall be published one time in the official newspaper. Amendments reducing the area may be incorporated into the proposed ordinance without the necessity of publishing said amendments and without the necessity of republication of said ordinance as amended. The proposed ordinance shall not thereafter be finally acted upon until at least 30 days have elapsed after the publication thereof; and upon the final passage of any such ordinance, the boundaries of the city shall thereafter be as fixed in such ordinance. The additional territory annexed shall be a part of the city and the property situated therein shall bear its pro rata part of the taxes levied by the city as provided by state law. The inhabitants thereof shall be entitled to all the rights and privileges of all the citizens and shall be bound by the acts, ordinances and resolutions of the city.

CHAPTER II. POWERS OF CITY

SEC. 1. POWERS OF THE CITY.

The City of Dallas, as such body politic and corporate, shall have perpetual succession and shall have the following powers:

(1) to use a corporate seal;

(2) to sue and be sued;

(3) to implead and be impleaded in all courts;

(4) to institute and prosecute suits without giving security therefor, and to appeal from judgments of the courts without giving supersedeas or cost bonds, other bonds or security whatever;

(5) to contract and be contracted with;

(6) to acquire property within or without its boundaries or within the boundaries of other municipalities for any public purpose, in fee simple or lesser interest or estate, by purchase, gift, devise, lease or condemnation, and may sell, rent, lease, hold, manage and control any property now owned by it or which it hereafter may acquire; construct, own, lease, operate and regulate public utilities;

(7) to assess, levy and collect taxes for general and special purposes on all lawful subjects of taxation;

(8) to borrow money on the faith and credit of the city by the issue or sale of bonds, warrants or notes of the city;

(9) to appropriate the money of the city for all lawful purposes;

(10) to create, provide for, construct, regulate and maintain public works and public improvements of any nature;

(11) to levy and collect assessments for local improvements;

(12) to levy an occupation tax on any person, occupation, calling or business where permitted under the laws of this state;

(13) to license and regulate vehicles operated for hire and fix and regulate the rates to be charged therefor;

(14) to license and regulate persons, corporations, and associations engaged in any business, occupation, profession or trade;

(15) to license and regulate all places of public amusement;

(16) to define nuisances and prohibit the maintenance of any nuisance within the corporate limits of the city to within 5,000 feet of the corporate lines, outside of the city limits, and abate such nuisances by summary proceedings and provide for the punishment of the authors thereof;

(17) to regulate the use of automobiles, motorcycles and other motor-driven vehicles, and the speed thereof and prescribe the proper lighting of the same when used at night;

(18) to provide for the inspection of buildings and all works of construction and prescribe and enforce proper regulations in regard thereto;

(19) to regulate and locate or prohibit the erection of all poles in the city and cause the same to be removed or changed at any time;

(20) to provide for the inspection of weights and measures and fix standards of weights and measures;

(21) to provide for the regulation of bakeries and prescribe the weight and quality of bread manufactured or sold in the city;

(22) to provide for the inspection and regulation of dairies located inside the city limits or at any other place from which milk or other products are sold within

the city, and for the inspection of all cows and facilities from which milk is sold in the city, and prescribe fees to be charged in connection with such inspection, and establish and maintain a standard of quality of all dairy products sold in the city;

(23) to regulate, restrain or prohibit the running at large of all animals in the city, and to license same;

(24) to adopt any ordinance or regulation having for its purpose the prevention of fires or the removal of fire hazards;

(25) to regulate burial grounds, cemeteries and crematories and condemn and close same in the thickly settled portions of the city when public interest and public health may demand, and regulate the burial of the dead;

(26) to provide for a system of vital statistics;

(27) to define, prohibit, abate, suppress and prevent all things detrimental to the health, morals, comfort, safety, convenience and welfare of the inhabitants of the city;

(28) to regulate the construction and height of, and materials used in, all buildings and structures, and the maintenance and occupancy thereof;

(29) to regulate and control the use, for whatever purpose, of the streets and all other public places;

(30) to create, establish, abolish and organize offices and fix the salaries, working conditions, and compensation of all officers and employees, except those set out in the Charter;

(31) to make and enforce all police, health, sanitary and other regulations, and pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the city, for the performance of the functions thereof, for the order and security of its inhabitants and to protect the peace, lives, health and property of such inhabitants, and to provide suitable penalties for the violation of any ordinance enacted by the city;

(32) to open, extend, straighten, widen or alter any street, alley, avenue, boulevard, sidewalk, parkway or public way, and to close or vacate and abandon the same;

(33) to expend public funds for purposes of advertising and public information;

(34) to have the exclusive right to erect, own, maintain and operate a waterworks and sanitary sewer system, or any part thereof, for the use of said city and its inhabitants, and to regulate the same, but shall not have the power or right to sell said waterworks system; to prescribe rates for water and sanitary sewer services furnished to the inhabitants, and to make such rules and regulations as the council may deem expedient, including the power to extend water and sanitary sewer lines and assesses a portion or all of cost therefor and affix a lien against the property and the owner thereof; to do anything whatsoever necessary to operate and maintain said waterworks, and to compel the owners of all property and the agents of such owners to pay all charges for water and sanitary sewer services furnished upon such

property; excess property in the waterworks system may be sold as other property;

(35) to make provision for care and sustenance of policemen, firemen and fire alarm operators who have been disabled while in the service of the city, or who, after long and continued service, shall become by reason of old age and informities incapacitated to discharge their duties, or because of longevity of service alone, and to make provision for the aid and relief of the widows, minor children and dependents of deceased policemen, firemen, and fire alarm operators and may provide for the creation of a fund or funds for such purposes, from the general revenue of the city or from such other sources as may be prescribed by the council under such rules and regulations as the council may adopt, and said city may exercise all of the powers as may be conferred upon the city council by acts of the legislature of the State of Texas;

(36) to make provision for the care and sustenance of all of the officers and employees of the city who have been disabled while in the service of the city, or who after long and continued service, shall become by reason of old age and infirmities incapacitated to discharge their duties, or because of longevity of service alone, to provide for the aid and relief of the widows, minor children and dependents of deceased officers and employees; to provide for the creation of a fund or funds for such purposes, from the general revenue of the city or from such other sources as may be prescribed by the council under such rules and regulations as the council may adopt;

(37) by ordinance or resolution, to provide for and construct a general storm sewer and drainage system in the city which may be divided into public and private sewers and drains and be built, maintained and conducted in such manner, as the city council may provide. For the purpose of establishing a general storm sewer and drainage system, the city council shall have full power to change any river, creek, bayou or other drain, or any part thereof, so as to divert the drainage thereof in accordance with a general drainage plan or any special plan providing therefor;

(38) to adopt rules and regulations for the civil service system;

(39) to fix and regulate the rates of gas, water, electricity and other utilities, and to regulate and fix the fares, tolls and charges of local telephones and exchanges; of public carriers and motor vehicles, where they are transporting passengers, freight or baggage, and generally to fix and regulate the rates, tolls or charges and the kind of service of all public utilities of every kind, unless otherwise required by state law; (Amend. of 4-3-76, Prop. No. 10)

(40) to regulate the speed of engines, locomotives, electric railways, or other power-driven equipment operating upon tracks, rails, or defined routes, either at ground level, overhead or underground within the limits of the city, and to regulate the operation of the same so as to prohibit the blocking of intersections, streets, alleys, avenues or impeding the free flow of vehicular traffic or pedestrians;

(41) to contract with public service carriers, common carriers, or private carriers or with transportation authorities for the furnishing of transportation facilities within the city limits of Dallas and connecting the adjoining areas; including the joint use of publicly owned and privately owned or joint publicly owned facilities to provide an interregional transportation network, both within and without the city limits of Dallas;

(42) to require any and all railroad companies operating any track upon or across any public street of the city, to reduce any such track below the level of the streets intersected or occupied by any such track, or to elevate any such track above the level of the streets intersected or occupied by any such track, and to require the company or companies owning or operating any such track to provide necessary and proper crossing for the public travel at intersecting streets; all such work to be done in the manner required by the city;

(43) to require any holder of a franchise from the city to allow the use of its tracks, poles, underground conduits and wires by any other holder to which the city shall grant a franchise upon payment of a reasonable rental therefor to be fixed by the city council;

(44) to exercise any of its powers or perform any of its functions and may participate in the financing thereof, jointly or in cooperation, by contract or otherwise, with the State of Texas, any count of this state or any of the civil agencies thereof which have any of the municipal powers, or the United States or any agency thereof;

(45) to acquire, construct, or own, within or without the city, either wholly or in cooperation with any other city, county or political subdivision of the state, an airport or airports, either by purchase, donation, bequest, eminent domain or otherwise; to provide for the operation, maintenance, control and financing thereof, the same as though wholly owned by the city within its city limits;

(46) to acquire, by purchase, gift or devise, or by the exercise of the right of eminent domain by and through condemnation proceedings, and own, in fee simple or otherwise, either public or private property located inside or outside of the corporate limits of the city or within any county in the state, for the extension, improvement and enlargement of its waterworks system, including riparian rights, water supply reservoirs, standpipes, watersheds, dams, the laying, building, maintenance and construction of water mains, rights-of-way in connection therewith, and the laying, erection, establishment or maintenance of any necessary appurtenances or facilities which will furnish to the inhabitants of the city an abundant supply of wholesome water; for sewerage plants and systems; rights-of-way for water and sewer lines; parks, playgrounds, fire stations, police stations, airports and landing fields, burial grounds and cemeteries, incinerators or other garbage disposal plants, electric light and power plants and rights-of-way for lines in connection therewith, gas plants and rights-of-way for gas lines in connection therewith; streets, boulevards and alleys or other public ways; city jails, prison farms, city halls and other municipal buildings, municipal garages, and parking facilities, or any rights-of-way needed in

connection with any property used for any purpose hereinabove named; for the straightening or improving of the channel of any stream, branch or drain and for any other municipal purpose. The procedure to be followed in any condemnation proceedings hereunder and authorized herein shall be in accordance with the provisions of the state law with reference to eminent domain. The provisions of Title 52 of the Revised Civil Statutes of Texas (1925), as amended, or as may hereafter be amended, shall apply to such proceedings, or such proceedings may be under any other state law now in existence or that hereafter may be passed governing and relating to the condemnation of land for public purposes by the city;

(47) to exercise all the powers conferred upon water improvement districts or water control and preservation districts under the state law as the same now exists or may hereafter be amended, providing for the exercise of the rights of eminent domain by and through condemnation proceedings. It shall also have all the powers authorized by Article 7880-126, Revised Civil Statutes of the State of Texas, as the same presently exists or may hereafter be amended, and all other powers conferred upon cities and towns in the State of Texas acting individually or jointly, in the furnishing of an adequate supply of wholesome water. It shall have authority to sell any surplus water not needed by the City of Dallas;

(48) to erect and establish work houses, houses of correction, or rehabilitation facilities within or without the city limits; to make all necessary rules and regulations therefor; to employ personnel necessary to manage and control the same; to assign persons confined to the city jail to any such facility so established;

(49) to provide a code of ethics by ordinance which shall be binding on all officers, employees, and elective and appointive officials as provided herein, settling out the acts, conduct and financial interest which shall be considered to be in conflict with the position they hold and providing the procedure for enforcing the same. This may be either in addition to, or incorporated into personnel rules and regulations as pertain to various employees.

SEC. 2. GENERAL POWERS ADOPTED.

The enumeration of particular powers in the Charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated herein, implied thereby or appropriate to the exercise thereof, the city shall have and may exercise all other powers which under the Constitution and laws of the State of Texas, it would be competent for the Charter specifically to enumerate. The city shall have and exercise all the powers conferred upon cities by what is known as the Home Rule Amendment to the Constitution of the State of Texas and the Enabling Act relative thereto, passed by the Thirty-Third Legislature of the State of Texas, found in the published laws of said legislature, Regular Session, pages 307 to 317, and effective July 7, 1913, and all other laws passed by the legislature of the State of Texas, relating thereto, or which may hereafter be passed by said legislature in relation to such matters.

CHAPTER XV. PLANNING AND ZONING

(Renamed and Renumbered by Amend. of 6-12-73, Prop. No. 43)

SEC. 1. COMPREHENSIVE PLANNING.

(1) CONTENT. The council may adopt, and may from time to time modify, a comprehensive plan setting forth in graphic and textual form, policies to govern the future physical development of the city. Such plan may cover the entire city and all of its functions and services or may consist of a combination of plans governing specific functions and services or specific geographic areas which together cover the entire city and all of its functions and services.

(2) ADOPTION. Upon receipt from the city manager of a proposed comprehensive plan or proposed modification of the existing plan, the council shall hold a public hearing on the proposed comprehensive plan or modification thereof and shall thereafter adopt it by resolution with or without amendment, or reject the same.

(3) EFFECT. The comprehensive plan shall serve as a guide to all future council action concerning land use and development regulations, urban conservation and rehabilitation programs and expenditures for capital improvements. (Renumbered by Amend. of 6-12-73, Prop. No. 43)

SEC. 2. URBAN CONSERVATION AND REHABILITATION AND REDEVELOPMENT.

The council may by ordinance provide for urban redevelopment, rehabilitation and conservation programs for:

(1) the alleviation or prevention of slums, obsolescence, blight or other conditions of urban deterioration; and

(2) the achievement of the most appropriate use of land. (Renumbered by Amend. of 6-12-73, Prop. No. 43)

SEC. 3. ZONING COMMISSION.

The city council shall appoint 15 qualified voters of the City of Dallas who shall constitute the zoning commission of the City of Dallas, and shall be the city plan commission as the same is referred to by state statute for the approval of plats and subdivisions. The members shall possess the same qualifications and be subject to the same disqualifications as provided by the Charter for members of the city council, or general laws of the State of Texas. The city council shall name one of the members to be the chairman and one to be the vice chairman. (Renumbered by Amend. of 6-12-73, Prop. No. 43)

SEC. 4. DUTIES OF ZONING COMMISSION.

The zoning commission shall:

(1) Adopt, subject to approval of the city council, such rules and regulations as they deem best to govern

their actions, proceedings and deliberations, including the time and place of meeting.

(2) Upon application made, advertise and hold public hearings on zoning or changes in zoning, and make recommendations thereon to the city council.

(3) Act as an advisory body to the city council in relation to any changes in the boundaries of the various original districts and any changes in the zoning ordinances and regulations to be enforced therein. Such recommendation shall be made after advertisement of and a public hearing held thereon. Notice of such public hearing shall be published at least one time in a newspaper of general circulation in the city at least 10 days prior to the date of said hearing, or as otherwise provided by state law or this charter.

(4) Administer provisions of state law regarding the platting and recording of subdivisions and additions, and in connection therewith, to require the owners and developers of land who desire to subdivide, plat or replat land for urban development, to provide for building setback lines, to dedicate streets, alleys, parks, easements or other public places of adequate width an size; to coordinate street layouts and street planning with the city and with other municipalities, and to coordinate the same with the county, state and federally designated highways, as they may deem best in the interest of the general public. In connection with the planning and the platting of property, the zoning commission shall have the power to consider the character of development or land use contemplated by the proposed platting and the zoning of the

property, and require off-street parking, streets and alleys of adequate width to be provided for that purpose.

(5) Make recommendations to the city manager and the city council on matters affecting the physical development of the city.

(6) Advise and make recommendations on the comprehensive plan and the implementation thereof as may be requested by the city manager and the city council.

(7) Exercise all other responsibilities as may be provided by law. (Renumbered by Amend. of 6-12-73, Prop. No. 43; Amend. of 8-12-89, Prop. No. 9)

SEC. 5. DEDICATION OF STREETS, ALLEYS AND PUBLIC PROPERTIES.

The action of the zoning commission in requiring the dedication of streets, alleys and public places shall not amount to an acceptance of said dedication, nor estop the city council to deny the same. Acceptance of all dedications shall be by action of the city council, or when the city council shall have made actual appropriation of the same by entry, use or improvement. (Renumbered by Amend. of 6-12-73, Prop. No. 43)

SEC. 6. CITY URBAN DEVELOPMENT COMMISSION.

In addition to the zoning commission, the city council may have by ordinance provide for an urban development commission. The ordinance creating the same shall state how the body shall be constituted, the qualifications

of the members and the duties of the same. (Renumbered by Amend. of 6-12-73, Prop. No. 43)

SEC. 7. ALTERNATE MEMBERS OF THE BOARD OF ADJUSTMENT.

In addition to the membership provided by state law to serve on the board of adjustment, the city council may, if it so desires, appoint six additional members who shall be designated as alternate members. the alternate members shall serve on the board at the designation of the board chair in any case where any regular member of the board of adjustment is either absent or unable to serve in any particular case for any reason so that all cases to be heard by the board of adjustment will always be heard by the minimum number of members required by state law. These alternate members, when appointed, shall serve for the same period as the regular members, and any vacancies shall be filled in the same manner. (Amend. of 6-12-73, Prop. No. 28; Amend. of 5-3-97, Prop. No. 11)

SEC. 8. THOROUGHFARE PLAN.

The city council shall by ordinance adopt a thoroughfare plan. A thoroughfare plan now in existence or hereafter adopted by the city council shall not be changed except by an ordinance duly adopted after a public hearing as herein provided.

Prior to any change in a thoroughfare plan, the city council shall hold a public hearing. Written notice of all public hearings before the city council on proposed changes in the thoroughfare plan shall be sent to owners

of real property lying within 200 feet of the area of the proposed change, such notice to be given, not less than 10 days before the date set for hearing, to all such owners who have rendered their said property for city taxes as the ownership appears on the last approved city tax roll. Such notice may be served by depositing the same, properly addressed and postage paid, in the United States mail. (amend. of 1-17-81, Prop. No. 3)

CHAPTER 27

MINIMUM URBAN REHABILITATION STANDARDS

ARTICLE I.

GENERAL PROVISIONS.

Sec. 27-1. Legislative findings of fact.
Sec. 27-2. Purpose of chapter.
Sec. 27-3. Definitions.
Sec. 27-3.1. Code enforcement official.

ARTICLE II.

ADMINISTRATION.

Sec. 27-4. Violations; penalty.
Sec. 27-5. Inspection.
Sec. 27-5.1. Donation of noncomplying property to a nonprofit corporation.
Sec. 27-5.2. Retaliation against tenants prohibited.
Sec. 27-6. Urban rehabilitation standards board.
Sec. 27-7. Hearing panels.
Sec. 27-8. Powers and duties of a hearing panel; advisory responsibilities of the board.
Sec. 27-9. Procedure.
Sec. 27-10. Failure to comply with board order.

ARTICLE III.

MINIMUM STANDARDS.

Sec. 27-11. Minimum standards; responsibilities of owner.
Sec. 27-12. Responsibilities of occupant.

ARTICLE IV.

REPAIR, DEMOLITION, RECEIVERSHIP, VACATION, RELOCATION, CLOSURE, AND CIVIL PENALTIES.

Sec. 27-13. Urban nuisance; repair, demolition, receivership, and civil penalties; notice.
Sec. 27-14. Rehearing of repair and demolition orders and civil penalty assessments.
Sec. 27-14.1. Treatment for insects and rodents.
Sec. 17-14.2. Rehearing review requirements.
Sec. 27-14.3. Rehearing review.
Sec. 27-15. Reduction of occupancy load; vacation of structure; relocation of occupants; placing of placard on structure.
Sec. 27-16. Closure of a structure.

ARTICLE V.

RESIDENTIAL HOTELS

Sec. 27-17. Occupancy record cards.
Sec. 27-18. Fee; renewal.
Sec. 27-19. Maximum number of occupants; posting card; altering card.
Sec. 27-20. Designation of guest rooms; posting notices.
Sec. 27-20.1. On-site hotel manager; notice to occupants.
Sec. 27-21. Inspections; maintenance of records.
Sec. 27-22. Required facilities.
Sec. 27-23. Cooking food prohibited.

ARTICLE VI.

MASTER METERED UTILITIES.

Sec. 27-24. Definitions.
Sec. 27-25. Records of ownership and management maintained by utility companies.

Sec. 27-26. Notice to tenants.
Sec. 27-27. Notice of utility interruption.
Sec. 27-28. Nonpayment of utility bills – Essential utility service.

ARTICLE VII.

LICENSING OF APARTMENT COMPLEXES.

Sec. 27-29. Definitions.
Sec. 27-30. Authority of director.
Sec. 27-31. License required; defenses.
Sec. 27-32. License application.
Sec. 27-33. License fees.
Sec. 27-34. Issuance, denial, and display of license.
Sec. 27-35. Revocation of license.
Sec. 27-36. Appeals.
Sec. 27-37. Amendments to license.
Sec. 27-38. Expiration and renewal of license.
Sec. 27-39. Nontransferability.
Sec. 27-40. Licensee's records.
Sec. 27-41. Failure to pay ad valorem taxes.
Sec. 27-42. Notification of change of information.
Sec. 27-43. Inspections; reinspection fees.

ARTICLE I.

GENERAL PROVISIONS.

SEC. 27-1. LEGISLATIVE FINDINGS OF FACT.

There exists in the city of Dallas, Texas, structures used for human habitation and nonresidential purposes that are substandard in structure and maintenance. Furthermore, inadequate provision for light and air, insufficient protection against fire, lack of proper heating, insanitary conditions, and overcrowding constitute a

menace to the health, safety, morals, welfare, and reasonable comfort of the citizens of the city of Dallas. The existence of such conditions will create slum and blighted areas requiring large scale clearance, if not remedied. Furthermore, in the absence of corrective measures, such areas will experience a deterioration of social values, a curtailment of investment and tax revenue, and an impairment of economic values. The establishment and maintenance of minimum structural and environmental standards are essential to the prevention of blight and decay and the safeguarding of public health, safety, morals, and welfare. (Ord. Nos. 15198; 19234)

SEC. 27-2. PURPOSE OF CHAPTER.

(a) The purpose of this chapter is to protect the health, safety, morals, and welfare of the citizens of the city of Dallas by establishing minimum standards applicable to residential and nonresidential structures. Minimum standards are established with respect to utilities, facilities, and other physical components essential to make structures safe, sanitary, and fit for human use and habitation. Demolition of structures is provided for as a last resort when compliance with standards cannot reasonably be achieved.

(b) This chapter is found to be remedial and essential to the public interest, and it is intended that this chapter be liberally construed to effect its purpose. All structures within the city on the effective date of this chapter, or constructed thereafter, must comply with the provisions of this chapter. (Ord. Nos. 15198; 19234)

SEC. 27-3. DEFINITIONS.

In this chapter:

(1) BASEMENT means the portion of a structure that is partly underground and has more than one-half its height, measured from clear floor to ceiling, above the average finished grade of the ground adjoining a structure.

(2) BATHROOM means an enclosed space containing one or more bathtubs, showers, or both, and which may also include toilets, lavatories, or fixtures serving similar purposes.

(3) BOARD means the urban rehabilitation standards board.

(4) CELLAR means the lowermost portion of a structure partly or totally underground having one-half or more of its height, measured from clear floor to ceiling, below the average finished grade of the adjoining ground.

(5) DEPARTMENT means the department designated by the city manager to enforce and administer this chapter.

(6) DIRECTOR means the director of the department designated by the city manager to enforce and administer this chapter and includes representatives, agents, or department employees designated by the director.

(7) DWELLING means a structure or building occupied as a residence.

(8) FLOOR SPACE means the total area of all habitable space.

(9) GRADE means the natural surface of the ground, or surface ground after completion of any change in contour.

(10) HABITABLE SPACE means the space occupied by one or more persons while living, sleeping, eating, and cooking; excluding kitchenettes, bathrooms, toilet rooms, laundries, pantries, dressing rooms, closets, storage spaces, foyers, hallways, utility rooms, heater rooms, boiler rooms, and basement or cellar recreation rooms.

(11) KITCHEN means a space, 60 square feet or more in floor area with a minimum width of five feet, used for cooking or preparation of food.

(12) KITCHENETTE means a space, less than 60 square feet in floor area, used for cooking or preparation of food.

(13) OPERATING CONDITION means free of leaks, safe, sanitary, and in good working order.

(14) OWNER means a person claiming, or in whom is vested, the ownership, dominion, or title of real property, including, but not limited to:

(A) the holder of fee simple title;

(B) the holder of a life estate;

(C) the holder of a leasehold estate for an initial term of five years or more;

(D) the buyer in a contract for deed; and

(E) a mortgagee, receiver, executor, or trustee in control of real property;

but not including the holder of a leasehold estate or tenancy for an initial term of less than five years.

(15) PERSON means any individual, corporation, organization, partnership, association, or any other legal entity.

(16) PLUMBING FIXTURES means gas pipes, water pipes, toilets, lavatories, sinks, laundry tubs, dishwashers, garbage disposal units, clothes-washing machines, catch basins, wash basins, bathtubs, shower baths, sewer pipes, sewage system, septic tanks, drains, vents, traps, and other fuel-burning or water-using fixtures and appliances, together with all connections to pipes.

(17) PREMISES or PROPERTY means a lot, plot, parcel of land, including any structures on the land.

(18) PROPERTY MANAGER means a person who for compensation has managing control of real property.

(19) PUBLIC SEWER means a sewer operated by a public authority or public utility and available for public use.

(20) RESIDENTIAL HOTEL means a structure that receives more than 50 percent of its rental income from occupancies of 30 consecutive days or more and contains:

(A) more than five guest rooms with living and sleeping accommodations, but no kitchen or kitchenette;

(B) more than five guest rooms with living, sleeping, and kitchen or kitchenette facilities that are offered for rental on a daily basis; or

(C) more than five guest rooms with living and sleeping accommodations, each of which is individually secured and rented separately to one or more individuals who have access to bathroom, kitchen, or dining facilities outside the guest room on a common basis with other occupants of the structure.

(21) SANITARY means any condition of good order and cleanliness that precludes the probability of disease transmission.

(22) STRUCTURE means that which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.

(23) URBAN NUISANCE means a premises or structure that:

(A) is reasonably dangerous to the physical health or safety of an occupant or other person; or

(B) because of violations of Section 27-11, its state of disrepair is such that it could reasonably cause injury, damage, harm, or inconvenience to a considerable portion of the community in the use and enjoyment of property, materially interfering with the proper use or comfort and enjoyment of surrounding property, taking into consideration the nature and use of the properties in

the area and the character of the community in which they are situated, which condition would be substantially offensive and annoying to persons of ordinary sensibilities, tastes, and habits living in the community. (Ord. Nos. 15198; 15919; 16473; 17226; 19234; 19896; 22154)

SEC. 27-3.1. CODE ENFORCEMENT OFFICIAL.

The director, or a designated representative, shall serve as the code enforcement official of the city. The code enforcement official shall have the power to obtain search warrants allowing the inspection of any specified premises to determine the presence of a health hazard or unsafe building condition, including but not limited to any structural, property, or utility hazard, or a violation of any health or building regulation, statute, or ordinance. (Ord. 20433)

ARTICLE II.

ADMINISTRATION.

SEC. 27-4. VIOLATIONS; PENALTY.

(a) A person who violates a provision of this chapter, or who fails to perform an act required of him by this chapter, commits an offense. A person commits a separate offense each day or portion of a day during which a violation is committed, permitted, or continued.

(b) *Criminal penalties.*

(1) An offense under this chapter is punishable by a fine not to exceed $2,000; except, that an offense under Section 27-5.2 and 27-25 of this chapter is punishable by a fine not to exceed $500.

(2) An offense under this chapter is punishable by a fine of not less than:

(A) $200 for a first conviction of a violation of Section 27-11(a)(1), (3), or (4) or 27-11(b)(1), (2), (3), (4), (6), (7), (8), (9), or (10);

(B) $500 for a first conviction of a violation of section 27-11(a)(2), (5), or (6), 27-11(b)(5), 27-11(c), or 27-11(d); and

(C) $2,000 for a first conviction of a violation of Section 27-31.

(3) The minimum fines established in Subsection (b)(2) will be doubled for the second conviction of the same offense within any 24-month period and trebled for the third and subsequent convictions of the same offense within any 24-month period. At no time may the minimum fine exceed the maximum fine established in subsection (b)(1).

(c) Except where otherwise specified, a culpable mental state is not required for the commission of an offense under this chapter.

(d) In addition to imposing the criminal penalty prescribed in Subsection (b), the city may, in accordance with Chapter 54, Subchapter B of the Texas Local Government Code, bring a civil action against a person violating a provision of this chapter. The civil action may include, but is not limited to, a suit to recover a civil penalty not to exceed $1,000 for each day or portion of a day during which the violation is committed, continued, or permitted.

(e) The penalties provided for in Subsections (b) and (d) are in addition to any other enforcement remedies that the city may have under city ordinances and state law.

(f) The director has the authority to enforce provisions of Chapter 7A and Article II, Chapter 18 of this code. (Ord. Nos. 19234; 19896; 20017; 20599; 22695)

SEC. 27-5. INSPECTION.

For the purpose of ascertaining whether violations of this chapter exist, the director is authorized at a reasonable time to inspect:

(1) the exterior of a structure and premises which contain no structure; and

(2) the interior of a structure, if the permission of the owner, occupant, or person in control is given. (Ord. Nos. 15198; 19234)

SEC. 27-5.1. DONATION OF NONCOMPLYING PROPERTY TO A NONPROFIT CORPORATION.

(a) a judge of the municipal court may dismiss one or more citations of a property owner who is charged with violating this chapter, if the property owner donates the property, for which the citations have been issued, to a nonprofit corporation selected by the city.

(b) The urban rehabilitation standards board may waive a civil penalty or part of a civil penalty assessed against a property owner pursuant to Section 27-13 of this

chapter if the property owner donates the property, for which the civil penalty has been assessed, to a nonprofit corporation selected by the city.

(c) The city is authorized to contract with a nonprofit corporation for the acceptance of property donated pursuant to Subsection (a) or (b) of this section. The terms of the contract must provide that the nonprofit corporation will:

(1) within 90 days from the date of acceptance of the donated property, bring the property into compliance with this chapter, including, but not limited to, providing all necessary cleanup, maintenance, repairs, and alterations; and

(2) within 120 days from the date of acceptance of the donated property, sell the property directly to an occupant owner or rent the property directly to an occupant tenant. (Ord. Nos. 19234; 19896; 21973)

SEC. 27-5.2. RETALIATION AGAINST TENANTS PROHIBITED.

(a) A landlord commits an offense if he raises a tenant's rent, diminishes services to a tenant, or attempts eviction of a tenant within six months after:

(1) the tenant files a valid complaint with the director complaining of a violation of this chapter on property occupied by the tenant; a complaint is considered valid if it results in an action described in Paragraph (2), (3), or (4) of this subsection;

(2) the director issues to the landlord or his agent a written notice or citation listing any violation of this chapter that exists on property occupied by the tenant;

(3) the director issues to the landlord or his agent written notice of a hearing before the urban rehabilitation standards board concerning any violation of this chapter that exists on property occupied by the tenant;

(4) the tenant, after filing a complaint with the director and the landlord or his agent, files a written complaint with the city attorney complaining of a violation of this chapter on property occupied by the tenant, unless the complaint is later withdrawn by the tenant or dismissed on the merits; or

(5) repairs are completed on property occupied by the tenant in compliance with either a written notice or citation issued by the director or a written order issued by the urban rehabilitation standards board.

(b) It is a defense to prosecution under Subsection (a) that:

(1) rent was increased pursuant to an escalation clause in a written lease which provided for changes in costs of utilities, taxes and insurance;

(2) rent was increased, services were reduced, or notices to vacate were issued as part of a pattern of rent increases, service reductions, or evictions for an entire multidwelling project;

(3) the tenant was delinquent in rent when the landlord gave notice to vacate or filed an eviction action;

(4) the tenant was responsible for or caused a violation of this chapter that existed on property occupied by the tenant;

(5) the tenant's written lease fixing the rent, services, or term of occupancy had expired, unless, at the time an action described in Subsection (a)(1), (2), (3), or (4) occurred, a violation of this chapter that was reasonably dangerous to the physical health or safety of the tenant or another person existed on property occupied by the tenant;

(6) the tenant holds over after giving notice of termination or intent to vacate;

(7) the tenant holds over after the landlord gives notice of termination at the end of the rental term and, at the time the notice of termination was given, the landlord or his agent had not received actual notice that a valid complaint had been filed with the city complaining of violations of this chapter on property occupied by the tenant;

(8) before filing a complaint with the city complaining of a violation of this chapter on property occupied by the tenant, other than a violation that is reasonably dangerous to the physical health or safety of the tenant or another person, the tenant fails to comply with a written lease provision requiring the tenant to:

(A) notify the landlord or his agent, in writing, of the violation; and

(B) allow the landlord 15 days to correct the violation; or

(9) the landlord proves that the rent increase, service reduction, or attempted eviction was for good cause and not for purposes of retaliation against the tenant.

(c) An offense under this section may be prosecuted upon the filing of a written complaint by the tenant with the city attorney. (Ord. 20017)

SEC. 27-6. URBAN REHABILITATION STANDARDS BOARD.

(a) There is created the urban rehabilitation standards board, which is composed of 30 members and eight alternate members. The 30 members must be appointed by the city council, with each city council member making two appointments, and the eight alternate members must be appointed by the city council as a whole. The mayor shall appoint the chair. The board shall consist of:

(1) a registered architect who has had at least 10 years experience in the construction of buildings and housing;

(2) a mortgage loan banker who has been engaged in mortgage loan banking for at least 10 years;

(3) a home builder who has at least 10 years experience in the construction of homes;

(4) a licensed real estate broker who has at least 10 years experience in the appraisal of real estate;

(5) a person who is engaged in social or welfare work and having at least 10 years experience in public or private case work;

(6) a structural engineer who has at least 10 years experience in the construction of commercial buildings; and

(7) twenty-four members and eight alternate members chosen on the basis of their interest in community affairs.

(b) Members and alternate members must be residents of the city. Their appointment will be made in August of each odd-numbered year for a two-year term beginning on September 1. All members and alternate members shall serve until their successors are appointed and qualified.

(c) Alternate members must meet the same requirements and qualifications as regular board members, except that an alternate member has voting privileges only when sitting in for an absent member.

(d) The director of environmental and health services, the fire marshal, the building official, and the director of housing shall serve in an advisory capacity as ex officio members of the board with no voting privileges. (Ord. Nos. 15198; 19234; 19673; 21153; 21200; 21515; 21854; 22026)

SEC. 27-7. HEARING PANELS.

(a) The chair of the board shall divide the board into four hearing panels for the purpose of performing the duties of the board. Three panels will be composed of seven members, two alternate members, and the chair, and one panel will be composed of eight members, two

alternate members, and the chair. Five members constitute a quorum. Decisions of a hearing panel are made by a majority vote of those present.

(b) The chair is responsible for obtaining a quorum for each meeting of a panel. In the absence of a regular member, the chair may assign a member from another panel or an alternate member to serve. Each board member, including the chair, has full voting privileges on any panel and is free to attend any panel meeting.

(c) For the purpose of fulfilling attendance requirements, a member or alternate member who is absent from an assigned panel meeting but attends the meeting of one of the other panels immediately preceding or immediately following the missed panel meeting, will not, upon approval of the chair, be credited with an absence. A member or alternate member, however, must attend one meeting of another panel for each meeting of the assigned panel from which the member or alternate member is absent in order to avoid being credited with an absence. For the purpose of fulfilling attendance requirements, the chair is only required to attend the regular meetings of two of the hearing panels.

(d) Each hearing panel shall select a vice-chair to preside over its proceedings in the absence of the chair.

(e) The director shall assign cases other than rehearings to the hearing panels on a rotation basis. A rehearing must be assigned to the same hearing panel that originally heard the case.

(f) Each hearing panel has the same authority as the full board.

(g) A decision by a hearing panel constitutes a decision of the board. (Ord. Nos. 15198; 15919; 19234; 21200; 21854)

SEC. 27-8. POWERS AND DUTIES OF A HEARING PANEL; ADVISORY RESPONSIBILITIES OF THE BOARD.

(a) A hearing panel has the following powers and duties:

(1) To require the reduction in occupancy load of an overcrowded structure or vacation of a structure that is reasonably dangerous to the health, safety, or welfare of the occupants.

(2) To require, as an alternative to demolition of a structure found to be an urban nuisance, the repair of the structure by the owner or by the city.

(3) To require the demolition of a structure found to be an urban nuisance.

(4) To require the removal of personality from a structure ordered vacated or demolished. Removal may be accomplished by use of city forces or a private transfer company if the owner of the personalty is not known, or the whereabouts of the owner cannot be ascertained, or the owner fails to remove the personalty. A hearing panel may cause any personalty removed to be stored in the care and custody of a bonded warehouse facility. Costs of removal and storage are the responsibility of the owner of the personalty.

(5) To require that a vacant structure or vacant portion of a structure constituting a dangerous condition or nuisance be securely closed and made safe.

(6) To require or cause the correction of a dangerous condition on the land. Correction of a dangerous condition may be accomplished by city forces or private contractor. Costs of correction are the responsibility of the owner.

(7) To grant a variance when, in the opinion of a hearing panel, a literal interpretation of this chapter would result in the imposition of an unnecessary or unreasonable hardship.

(8) To assess a civil penalty, not to exceed $2,000 a day, against a property owner for each day or part of a day that he fails to repair or demolish a structure in compliance with a board order issued under Section 27-13 of this chapter.

(9) To cause an action to be brought in district court in accordance with Section 214.003 of the Texas Local Government Code for the appointment of a receiver for property found to be an urban nuisance.

(10) To require relocation of the occupants of a structure found to be an urban nuisance.

(b) In addition to the powers and duties of the hearing panels, the board shall periodically meet as a whole for the purpose of planning and advising the city council on matters concerning substandard housing and enforcement of this chapter. (Ord. Nos. 15198; 16473; 19234; 19896; 20470)

SEC. 27-9. PROCEDURE.

(a) The board may adopt rules not inconsistent with this chapter or Chapter 8 of this code. Meetings of the board or a hearing panel will be held at the call of the chairman, or in his absence the vice-chairman, or an acting chairman designated by the chairman, or as the board may determine. The chairman, acting chairman, or the vice-chairman may administer oaths and compel the attendance of witnesses.

(b) The director or his designated representative shall act as secretary to the board and the hearing panels.

(c) At each hearing of a hearing panel, an owner, lessor, occupant, or lienholder may present witnesses in his own behalf and is entitled to cross-examine any witness appearing against him.

(d) After a public hearing the decision of a hearing panel is final as to administrative remedies and a rehearing may not be granted except as provided by Sections 27-14 and 27-14.3.

(e) Once the decision of a hearing panel has become final under this section, Section 27-14, or 27-14.3, the person affected by an order may appeal the decision to the state district court. Appeal to the district court must be filed within 20 days from the date of receipt of notice of a final board order. Appeal in the district court shall be limited to a hearing under the substantial evidence rule. (Ord. Nos. 15198; 15919; 19234)

SEC. 27-10. FAILURE TO COMPLY WITH BOARD ORDER.

(a) A person commits an offense if he fails to correct a violation of this chapter in compliance with a board order that has become final under Section 27-9, 27-14, or 27-14.3.

(b) It is a defense to prosecution under Subsection (a) that the board order has been appealed to the state district court. (Ord. Nos. 15198; 16473; 18001; 19234)

ARTICLE III.

MINIMUM STANDARDS.

SEC. 27-11. MINIMUM STANDARDS; RESPONSIBILITIES OF OWNER.

(a) *Property standards.* An owner shall:

(1) eliminate a hole, excavation, sharp protrusion, and any other object or condition that exists on the land and is reasonably capable of causing injury to a person;

(2) securely cover or close a well, cesspool, or cistern;

(3) provide solid waste receptacles or containers when required by Chapter 18 of this code;

(4) provide drainage to prevent standing water and flooding on the land;

(5) remove dead trees and tree limbs that are reasonably capable of causing injury to a person; and

(6) keep the doors and windows of a vacant structure or vacant portion of a structure securely closed to prevent unauthorized entry.

(b) *Structural standards.* An owner shall:

(1) protect the exterior surfaces of a structure which are subject to decay by application of paint or other coating;

(2) fill hollow, masonry supporting piers, if used, with concrete and anchor the piers to concrete footings with a 5/8 inch steel dowel;

(3) provide and maintain railings for stairs, steps, balconies, porches, and elsewhere as specified in the Dallas Building Code;

(4) repair holes, cracks, and other defects reasonably capable of causing injury to a person in stairs, porches, steps, and balconies;

(5) maintain a structure intended for human occupancy and a structure used as an accessory to a structure intended for human occupancy in a weather-tight and water-tight condition;

(6) maintain floors, walls, ceilings, and all supporting structural members in a sound condition, capable of bearing imposed loads safely;

(7) provide cross-ventilation of not less than 1 1/2 square feet for each 25 lineal feet of wall in each basement, cellar, and crawl space;

(8) repair or replace chimney flue and vent attachments that do not function properly;

(9) repair holes, cracks, breaks, and loose surface materials that are health or safety hazards in or on floors, walls, and ceilings; and

(10) provide and maintain a moisture-resistant finish or material for the flooring or subflooring of each bathroom, shower room, and toilet room.

(c) *Utility standards.* An owner shall:

(1) provide and maintain in operating condition connections to discharge sewage from a structure of land into a public sewer system where available;

(2) provide and maintain in operating condition a toilet connected to a water source and to a public sewer, where available, in each structure intended for human habitation;

(3) provide and maintain in operating condition connections and pipes to supply potable water at adequate pressure to a structure intended for human occupancy;

(4) provide and maintain in operating condition a device to supply hot water of a minimum temperature of 120° F. within each structure intended for human habitation;

(5) provide and connect a kitchen sink, bathtub or shower, and lavatory to a cold and hot water source in each structure intended for human habitation;

(6) connect plumbing fixtures and heating equipment that the owner supplies in accordance with the Dallas Plumbing Code and Dallas Mechanical Code;

(7) provide and maintain heating equipment in operating condition so that it is capable of maintaining a minimum inside temperature of 68° F. from November 1 through April 15 in each room of a structure intended for human occupancy;

(8) if screens are not provided as required in Subsection (d)(2), provide and maintain in operating condition, from May 1 through October 15, refrigerated air equipment capable of maintaining a maximum inside temperature that is 20 degrees lower than the outside temperature of 85° F., whichever is warmer, in each room of a structure intended for human occupancy;

(9) provide and maintain in operating condition supply lines for electrical service to each structure intended for human occupancy if electrical service is available within 300 feet;

(10) connect each heating and cooking device that burns solid fuel to a chimney or flue; and

(11) provide and maintain in operating condition electrical circuits and outlets sufficient to safely carry a load imposed by normal use of appliances and fixtures.

(d) *Health standards.* An owner shall:

(1) eliminate rodents and vermin in or on the land;

(2) provide a structure intended for human habitation with a screen for keeping out insects at each opening of the structure if the structure is not cooled with refrigerated air;

(3) maintain the interior of a vacant structure or vacant portion of a structure free from rubbish and garbage;

(4) keep the interior of a structure free from insects, rodents, and vermin, except as specified in Section 27-12(b).

(e) It is a defense to prosecution under Subsection (a) of this section that the premises concerned is the site of new construction and reasonable and continuous progress is being made to complete the construction.

(f) It is a defense to a prosecution under Subsection (d)(4) of this section that the structure was treated to eliminate insects, rodents, and vermin by a person licensed under the Texas Structural Pest Control Act once within the preceding six months.

(g) An owner shall provide a tenant with alternative housing that meets the minimum standards required by this section when:

(1) after being issued a notice or citation for violation of Subsection (c)(7) of this section, the owner fails to repair heating equipment within 72 hours after receiving such notice or citation and the overnight low temperature, as measured by the National Weather Service at Dallas Love Field, is below 40° F. for three consecutive days after receiving such notice or citation; or

(2) after being issued a notice or citation for violation of Subsection (c)(8) of this section, the owner fails to repair refrigerated air equipment within 72 hours after receiving such notice or citation and the daytime high temperature, as measured by the National Weather

Service at Dallas Love Field, is 95° F. or above for three consecutive days after receiving such notice or citation.

(h) It is a defense to prosecution under Subsections (c)(7) and (c)(8) of this section and to the alternative housing requirements of Subsection (g) of this section that:

(1) failure to maintain heating and refrigerated air equipment in compliance with those subsections was the direct result of an act of nature or other cause beyond the reasonable control of the owner; or

(2) the owner is making diligent efforts to repair the heating and refrigerated air equipment in compliance with those subsections; if the owner demonstrates to the director that diligent efforts to repair are being made; the director will not issue a notice or citation for a violation of Subsection (c)(7) or (c)(8) of this section.

(i) It is a defense to prosecution under Subsection (c)(7) of this section and to the alternative housing requirements of Subsection (g)(1) of this section that a written contract is in effect requiring the tenant to provide and maintain heating equipment and the owner has provided utility connections for heating equipment in compliance with the Dallas Mechanical Code, as amended, in each room of the structure intended for human occupancy.

(j) It is a defense to prosecution under Subsection (c)(8) of this section and to the alternative housing requirement of Subsection (g)(2) of this section that the structure is provided with exterior windows and doors that are easily openable to provide air ventilation and

covered with screens in compliance with Subsection (d)(2) of this section. (Ord. Nos. 15198; 15372; 15919; 16473; 19234; 20578)

SEC. 27-12. RESPONSIBILITIES OF OCCUPANT.

(a) An occupant shall:

(1) maintain those portions of the interior of a structure under his control free from rubbish, garbage, and other conditions that would encourage infestation of insects, rodents, or vermin;

(2) remove an animal or animals from a structure if the presence of the animal or animals is a health hazard to an occupant;

(3) connect plumbing fixtures and heating equipment that the occupant supplies in accordance with the Dallas Plumbing Code and the Dallas Mechanical Code.

(4) provide solid waste receptacles or containers when required by Chapter 18 of this code; and

(5) not alter a structure or its facilities so as to create a nonconformity with Section 27-11 or this section.

(b) The tenant occupant of a single-family residential structure shall keep the interior of the structure free from insects, rodents, and vermin if the owner can show that the structure was treated to eliminate insects, rodents, and vermin by a person licensed under the Texas Structural Pest Control Act:

(1) within two weeks before the date the tenant took occupancy; or

(2) once within the preceding six months if there has been more than one tenant during the preceding six months. (Ord. Nos. 15198; 15372; 19234)

ARTICLE IV.

REPAIR, DEMOLITION, RECEIVERSHIP, VACATION, RELOCATION, CLOSURE, AND CIVIL PENALTIES.

(Ord. 20470, title)

SEC. 27-13. URBAN NUISANCE; REPAIR, DEMOLITION, RECEIVERSHIP, AND CIVIL PENALTIES; NOTICE.

(a) The director shall give notice of a hearing to consider repair, demolition, or receivership of a structure, or the assessment of a civil penalty against the owner, to the owner or owners, lessor, and occupant of the structure, and any mortgagee or lienholder of record of the real property concerned. A structure may be considered for repair, demolition, receivership, or a civil penalty if the structure is not maintained in compliance with one or more of the minimum standards of Section 27-11, and the structure is an urban nuisance. A structure for which notice of a hearing to consider receivership has been given may not be considered for any other action at that hearing.

(b) A public hearing to consider repair, demolition, or receivership of a structure, or the assessment of a civil penalty against the owner, shall be before a hearing panel of the board after notice has been given to the persons

designated in Subsection (a). If notice is by personal service or by certified mail that was sent more than 15 days before the scheduled hearing and the record shows that the notice was received by a person designated in Subsection (a) less than five days before the hearing, the person shall, upon request at the hearing, receive a resetting of the hearing. Written notice of the rescheduled hearing may be given to persons in attendance at that time. If notice is by publication, the final publication must be at least five days before the hearing. At the hearing the director shall present evidence of the condition of a structure and an owner, lessor, occupant, mortgagee, and lienholder, as well as any interested person, may present evidence on relevant issues.

(c) A hearing panel, after hearing evidence from each interested person present, may:

(1) find that the structure is not an urban nuisance and refer the matter to the director for further appropriate action;

(2) grant a variance in order to avoid the imposition of an unreasonable hardship;

(3) in the case of a single-family dwelling occupied by the owner where the health, safety, and welfare of other persons will not be affected, grant an exception to any provision of this chapter to avoid the imposition of an unreasonable hardship; or

(4) find that the structure is an urban nuisance and order;

(A) demolition of the structure;

(B) repair or correction of the structure within a specified period of time;

(C) repair or correction of the structure within a specified period of time and demolition of the structure if the repair or correction is not timely effected;

(D) repair or correction of the structure by the owner, mortgagee, or lienholder within a specified period of time and repair or correction by the city if not timely effected by the owner, mortgagee, or lienholder;

(E) repair, correction, or demolition of the structure within a specified period of time and assessment of a civil penalty against the owner for each day or part of a day that the owner fails to repair, correct, or demolish the structure; or

(F) an action to be brought in district court in accordance with Section 214,003 of the Texas Local Government Code for the appointment of a receiver of the property.

(d) Demolition of a structure may be accomplished by an owner, mortgagee, or lienholder as compliance with this section or by the city. Repair of a structure may be accomplished by an owner, mortgagee, or lienholder as compliance with this section, or by the city but only to the extent necessary to bring the structure into compliance with minimum standards and only if the structure is a residential structure with not more than 10 dwelling units.

(e) The expense of repair or demolition of a structure, when performed under contract with the city or by

city forces, and any civil penalty assessed against the owner, constitutes a nontransferable lien against the real property on which the structure stands or stood, unless it is a homestead as protected by the Texas Constitution, and the lien runs with the land. The city's lien attaches when notice of the lien is recorded and indexed in the office of the county clerk in the county in which the property is located. The notice must contain the name and address of the owner, if reasonably determinable, a legal description of the real property, the amount of expenses incurred by the city, and the balance due. The city's lien for demolition expenses is a privileged lien subordinate only to tax liens and all previously recorded bona fide mortgage liens attached to the property, if each mortgagee and lienholder is given notice and an opportunity to repair or demolish the structure. The city's lien for repair expenses or civil penalties is inferior to any previously recorded bona fide mortgage liens attached to the property, if each mortgagee and lienholder is given notice and an opportunity to repair or demolish the structure. The city's lien for repair expenses or civil penalties is inferior to any previously recorded bona fide mortgage lien attached to the real property if the mortgage lien was filed for record in the county clerk's office of the county in which the real property is located before the date the civil penalty is assessed or the repair is begun by the city, but is superior to all other previously recorded judgment liens. A lien acquired by the city under this subsection for repair expenses may not be foreclosed if the structure upon which the repairs were made is the residential homestead of a person 65 years of age or older and is occupied by that person.

(f) The city may use lawful means to collect, repair and demolition costs and civil penalties from an owner. Any civil penalty or other assessment imposed under this section accrues interest at the rate of 10 percent a year from the date of the assessment until paid in full. In any judicial proceeding regarding enforcement of city rights under this section, the prevailing party is entitled to recover reasonable attorney's fees from the nonprevailing party.

(g) The director shall give notice of demolition, repair by the city, or the assessment of a civil penalty, if the director determines that the owner has not complied with an order to repair issued under Subsection (c)(4)(C), (D), or (E).

(h) The director shall give notice of an order issued under Subsection (c)(4) and notice of demolition, repair by the city, or the assessment of a civil penalty under Subsection (g), at the time of issue, to each person designated in Subsection (a) and shall file each order under Subsection (c)(4) in the deed records of Dallas County. If an order to demolish or repair is timely effected, the director shall, upon request and payment of the cost by the owner, file a notice of compliance in the deed records of Dallas County.

(i) When an order issued under Subsection (c)(4) has been filed in the deed records of Dallas County, execution of the order is not affected by a sale or other transfer of the premises. A person acquiring interest in property after an order has been so filed is subject to the requirements of the order. The provisions of this subsection shall be included as a part of each order.

(j) Except for written notice of a rescheduled hearing served to a person attending the original setting of a hearing, the director shall serve notice required by this section by certified United States mail, return receipt requested, sent to the last known address of the person being notified. If the certified mail is returned undelivered, the director may serve the notice personally if the person to be notified can be found within Dallas County. If notice sent to an owner is returned undelivered, and after a diligent search, the director is unable to discover a correct address for the owner or is unable to serve the owner personally, then the director shall give notice by publication of the order once in the official newspaper of the city at least five days before the hearing. (Ord. Nos. 15198; 15372; 15919; 16473; 19234; 19896; 20470)

SEC. 27-14. REHEARING OF REPAIR AND DEMOLITION ORDERS AND CIVIL PENALTY ASSESSMENTS.

(a) A hearing panel may grant one rehearing if a person affected by an order and notice of demolition, repair by the city, or assessment of a civil penalty requests the rehearing within 10 days after notice is received. The rehearing shall not be given prior to issuance of a notice.

(b) When a rehearing is granted, the director shall stay all proceedings of demolition, repair by the city, or assessment of a civil penalty until conclusion of the rehearing.

(c) A rehearing fee of $540 shall accompany a request for a rehearing. A person may make written

affirmation of his inability to pay a fee and the hearing panel may waive the fee.

(d) A decision of the hearing panel on the rehearing is final as to administrative remedies, unless the person affected obtains a hearing under Section 27-14.3. (Ord. Nos. 15198; 15919; 18411; 18876, 19234; 19896)

SEC. 27-14.1. TREATMENT FOR INSECTS AND RODENTS.

When a structure is ordered demolished by a hearing panel, if the owner fails to comply with Chapter 15 of this code in obtaining certification from a person licensed under the Texas Structural Pest Control Act that:

(1) the structure is free of insects and rodents; or

(2) the structure has been treated within the preceding 30 days to eliminate insect and rodent infestation;

the city may obtain the certification and charge the cost apart of the expense of demolition constituting a lien against the real property as provided in Section 27-13(d). (Ord. Nos. 15202; 19234)

SEC. 27-14.2. REHEARING REVIEW COMMITTEE.

(a) The chairman shall appoint six members of the board to serve on a rehearing review committee. The chairman shall rotate appointments so that all members have an opportunity to serve on the committee during the

ordinary tenure of office. The committee shall make recommendations to a hearing panel only upon the concurring vote of at least four members of the committee.

(b) The rehearing review committee shall meet when called by the chairman or vice chairman and only when there are matters awaiting the committee's consideration, but not more often than once each month. (Ord. Nos. 15919; 19234)

SEC. 27-14.3. REHEARING REVIEW.

(a) If after the first rehearing, a person is unable to complete repair within the time specified by the hearing panel, he may request a hearing before the rehearing review committee by notifying the director within 10 days after receiving the second notice of demolition, repair by the city, or assessment of a civil penalty.

(b) Upon receiving a request for a rehearing review, the director shall study the facts of the case and shall submit a case to the rehearing review committee only when he can demonstrate that:

(1) the person requesting the review has made substantial progress in eliminating violations or has been prevented from doing so by circumstances beyond his control; or

(2) repairs made to the structure render it no longer an urban nuisance; or

(3) because of a change in circumstances, demolition of the structure is no longer appropriate and the director recommends the granting of a variance or exception as described in Section 27-13(c)(2) or (3).

(c) After hearing a case submitted by the director, the rehearing review committee may grant the person affected by an order and notice of demolition, repair by the city, or assessment of a civil penalty a second rehearing before the hearing panel, if the committee determines by a concurring vote of at least four members that one or more of the conditions in Subsection (b) exist, and a rehearing is warranted.

(d) A second rehearing, when granted, must be before the same hearing panel that originally heard the case, and the director shall schedule the rehearing for the next regular meeting of that hearing panel.

(e) The director shall give written notice of the rehearing to the person affected by the order and notice of demolition, repair by the city, or assessment of a civil penalty before he leaves the committee hearing. This personally served notice is the only notice necessary for a second rehearing.

(f) When a second rehearing is granted, the director shall stay all proceedings of demolition, repair by the city, or assessment of a civil penalty until conclusion of the rehearing.

(g) The person affected by the order and notice of demolition, repair by the city, or assessment of a civil penalty who has requested a second rehearing, shall pay a fee of $540 to the director prior to the date of the rehearing before the hearing panel. A person may make affirmation of inability to pay a fee and the hearing panel may waive the fee.

(h) The decision of the rehearing review committee to deny a person a second rehearing or the decision of the rehearing panel upon holding a second rehearing is final as to administrative remedies. (Ord. Nos. 15919; 19234; 19896)

SEC. 27-15. REDUCTION OF OCCUPANCY LOAD; VACATION OF STRUCTURE; RELOCATION OF OCCUPANTS; PLACING OF PLACARD ON STRUCTURE.

(a) The director shall, by certified mail, return receipt requested, sent to the last known address of the owner, lessor, and occupant of a structure and any mortgagee or lienholder of the real property concerned, give notice of a hearing to consider:

(1) reduction of occupancy load of a structure or portion of a structure that is overcrowded; or

(2) vacation of a structure or portion of a structure that is insanitary or unsafe and that presents a danger to the health, safety, or welfare of occupants.

(b) The director may place a red placard on a structure or dwelling unit that is insanitary or unsafe warning of its dangerous condition. A person commits an offense if he:

(1) without authority from the director, removes or destroys a red placard placed by the director;

(2) occupies a vacant structure or dwelling unit on which the director has placed a red placard; or

(3) as owner of a structure or dwelling unit, authorizes a person to occupy a vacant structure or dwelling unit on which the administrator has placed a red placard.

(c) A public hearing to consider reduction of occupancy load or vacation of a structure shall be held before a hearing panel of the board at least 10 days after receipt of notice by the owner, lessor, occupant, mortgagee, and lienholder, or at least five days after the mail is returned undelivered. The director shall present evidence of the overcrowded or dangerous condition of the structure and the owner, lessor, occupant, mortgagee, and lienholder may present evidence on relevant issues.

(d) The hearing panel shall order reduction of the occupancy load if it finds the structure or dwelling unit is overcrowded or vacation of a structure or dwelling unit if it finds the structure is dangerous to the health, safety, or welfare of the occupants. The hearing panel may order that the occupants of the structure or dwelling unit be relocated within a reasonable time. Notice of the order to reduce the occupancy load, to vacate, or to relocate shall be given to the occupants and the order shall be filed in the deed records of Dallas County.

(e) Vacation of a structure or relocation of the occupants of a structure may be accomplished by an owner, mortgagee, or lienholder as compliance with this section or by the city.

(f) The expense of vacation or relocation of the occupants of a structure, when performed under contract with the city or by city forces, constitutes a lien against the real property on which the structure is located, unless

it is a homestead as protected by the Texas Constitution. The city's lien attaches when notice of the lien is recorded and indexed in the office of the county clerk in the county in which the property is located. The notice must contain the name and address of the owner, if reasonably determinable, a legal description of the real property, the amount of expenses incurred by the city, and the balance due. If each mortgagee and lienholder is given notice and an opportunity to repair or demolish the structure, the city's lien is a privileged lien subordinate only to tax liens and all previously recorded bona fide mortgage liens attached to the property.

(g) Each occupant of a structure or dwelling unit that has been ordered vacated shall vacate the structure or dwelling unit within a specified time determined by the hearing panel. No person shall occupy a structure or dwelling unit that has been ordered vacated. The occupants of a structure or dwelling unit that has been ordered reduced in occupancy load shall reduce the occupancy to the number ordered by the hearing panel within the specified time determined by the hearing panel.

(h) A structure or dwelling unit is overcrowded if the following standards are not met:

(1) *Floor space per person.* Each structure or dwelling unit shall contain at least 150 square feet of habitable floor space for the first occupant and at least 100 square feet of additional habitable floor space for each additional occupant.

(2) *Sleeping space per person.* In each structure or dwelling unit of two or more rooms, each room occupied for sleeping purposes by one occupant shall contain at

least 70 square feet of floor space, and every room occupied for sleeping purposes by more than one person shall contain at least 50 square feet of floor space for each occupant.

(3) *Special provisions.* Children under 12 months of age shall not be considered occupants, and children under 12 years of age shall be considered as ½ of one occupant for purposes of Subparagraphs (1) and (2).

(4) *Ceiling height.* For purposes of Subparagraphs (1) and (2), a room of a structure must have a ceiling height of at least seven feet to be considered habitable space.

(i) A person who is ordered to vacate a structure shall not be considered a displaced person under Chapter 39A of this code and shall not be eligible for relocation assistance if the person:

(1) is ordered to vacate a structure as a consequence of the person's own intentional or negligent conduct;

(2) is an occupant of the same dwelling unit as the person described in Subparagraph (1); or

(3) began occupying the structure after the director placed a red placard on the structure warning of its dangerous condition. (Ord. Nos. 15198; 16473; 19234; 20470)

SEC. 27-16. CLOSURE OF A STRUCTURE.

(a) The director shall secure any structure that the director determines:

(1) violates a minimum standard established in Article III of this chapter; and

(2) is unoccupied or is occupied only by a person who does not have a right of possession to the structure.

(b) Before securing a structure under Subsection (a), the director shall post a notice on or near the front door of the structure stating that if the owner does not secure the structure within 48 hours, the city will secure the structure at the owner's expense.

(c) Before the 11th day after the date the director secures the structure, the director shall give notice to the owner by:

(1) personally serving the owner with written notice;

(2) depositing the notice in the United States mail addressed to the owner at the owner's post office address;

(3) publishing the notice at least twice within a 10-day period in a newspaper of general circulation in the county in which the structure is located, if personal service cannot be obtained and the owner's post office address is unknown; or

(4) posting the notice on or near the front door of the structure, if personal service cannot be obtained and the owner's post office address is unknown.

(d) The notice issued under Subsection (c) must contain:

(1) an identification, which is not required to be a legal description, or the structure and the property on which it is located;

(2) a description of the violation of the minimum standards that is present at the structure;

(3) a statement that the director will secure or has secured, as the case may be, the structure; and

(4) an explanation of the owner's entitlement to request a hearing about any matter relating to the director's securing of the structure.

(e) A public hearing shall be held before a hearing panel of the board if, within 30 days after the date the director secures the structure, the owner files with the director a written request for the hearing. The hearing must be held within 20 days after the date the request is filed. At the hearing, the director shall present evidence of the need to secure a structure and the owner may testify or present witnesses or written information about any matter relating to the director's securing of the structure.

(f) The hearing panel shall uphold the director's action in securing a structure if it finds the structure or a portion of the structure to be open and potentially dangerous to the health, safety, or welfare of the public. A structure is open if a door, window, or other opening is not securely closed to prevent unauthorized entry, and the structure is left unattended.

(g) The expense of securing a structure, when performed under city contract or by city forces, constitutes a lien against the real property on which the structure is

located, unless it is a homestead as protected by the Texas Constitution. The city's lien attaches when notice of the lien is recorded and indexed in the office of the county clerk in the county in which the property is located. The notice must contain the name and address of the owner, if reasonably determinable, a legal description of the real property, the amount of expenses incurred by the city, and the balance due. If each mortgagee and lienholder of the property is given notice required to be given the owner under this section and an opportunity to repair or demolish the structure, the city's lien is a privileged lien subordinate only to tax liens and all previously recorded bona fide mortgage liens attached to the property. The city may use lawful means to collect closure costs from an owner.

(h) The director may place a red placard on an open and vacant structure or portion of a structure warning of its dangerous condition.

(1) No person without authority from the director shall remove a red placard placed by the director.

(2) No person shall occupy an open and vacant structure on which a red placard has been placed. A person who begins occupying a structure or portion of a structure after the director places a red placard on the structure warning of its dangerous condition is also subject to the restrictions of Section 27-15(i).

(i) An unoccupied structure that is closed pursuant to an order of the director, the board, or the fire marshal, or that is closed by the owner of the structure without an official order, must be secured in compliance with Section 16-27.420A of this code, as amended.

(j) A structure intended for residential use or occupancy that, pursuant to an order of the director, the board, or the fire marshal, is closed by the owner through sealing the doors or windows with boards, or equivalent materials, shall be referred by the director to the board for appropriate action under Section 27-13 of this code if the structure:

(1) remains boarded up for 180 days or more without being occupied by the owner or a lawful tenant; and

(2) has at least one visible violation of this chapter. (Ord. Nos. 15198; 16473; 19234; 20470; 20679; 21025)

ARTICLE V.

RESIDENTIAL HOTELS.

SEC. 27-17. OCCUPANCY RECORD CARDS.

(a) A person commits an offense if he operates a residential hotel without an occupancy record card and a certificate of occupancy. Application for the occupancy record card must be renewed annually on a form prescribed by the director.

(b) The director shall issue an occupancy record card to an applicant if the residential hotel complies with each standard of Section 27-22 and each minimum standard of Section 27-11. (Ord. Nos. 15198; 19234; 22154)

SEC. 27-18. FEE; RENEWAL.

(a) The fee for an occupancy record card is an amount equal to $8.40 times the number of guest rooms in the residential hotel, whether occupied or unoccupied. No refund of a fee will be made.

(b) For purposes of computing fees required by Subsection (a), all guest rooms of a residential hotel will be considered, even if some guest rooms are used for occupancies of less than 30 consecutive days.

(c) An occupancy record card expires one year from the date of issuance. Application for a renewal card should be made within 60 days before the expiration date. (Ord. Nos. 15198; 19234; 19300; 21057; 22154; 22206)

SEC. 27-19. MAXIMUM NUMBER OF OCCUPANTS; POSTING CARD; ALTERING CARD.

(a) Notwithstanding the occupancy requirements of Section 27-15 of this chapter, the number of persons occupying a residential hotel at one time may never exceed 100, and the number of persons occupying a guest room of a residential hotel at one time may never exceed two. A person under 12 months of age will not be counted in calculating occupancy for purposes of this section.

(b) The director shall designate on each occupancy record card issued the maximum number of persons who may occupy at one time a guest room of a residential hotel.

(c) An owner of a residential hotel shall conspicuously post the occupancy record card near the main entrance of the residential hotel.

(d) A person commits an offense if he alters, defaces, or removes an occupancy record card without permission of the director. (Ord. Nos. 15198; 19234; 22154)

SEC. 27-20. DESIGNATION OF GUEST ROOMS; POSTING NOTICES.

(a) The owner shall designate each guest room of a residential hotel by number or letter and affix the appropriate number or letter at a conspicuous place near the entrance of each guest room.

(b) An owner shall not designate a particular number or letter to more than one guest room within a residential hotel.

(c) An owner shall post a notice of the maximum number of persons allowed to occupy a guest room at a conspicuous place within each guest room.

(d) A person commits an offense if he removes, defaces, or alters a number, letter, or notice posted in accordance with this section.

(e) It is a defense to prosecution under Subsection (d) that the person was acting with authorization from the owner of the residential hotel or the director for the purpose of correcting information. (Ord. Nos. 15198; 19234; 22154)

SEC. 27-20.1. ON-SITE HOTEL MANAGER; NOTICE TO OCCUPANTS.

(a) In this section, HOTEL MANAGER means a person authorized to perform managerial and operational

duties at a residential hotel, including, but not limited to, responding to complaints and emergencies at the residential hotel and receiving citations and notices of violations for the residential hotel.

(b) A hotel manager shall remain on the premises of a residential hotel:

(1) every day from 8:00 p.m. to 6:00 a.m., if the residential hotel has less than 15 guest rooms; and

(2) 24 hours every day, if the residential hotel has 15 or more guest rooms.

(c) The owner of a residential hotel shall post and maintain a notice in accordance with Subsection (d) containing the name, address, and telephone number of a hotel manager for the residential hotel. The owner shall correct the notice within 10 days of any change of information given in the notice.

(d) The notice must be posted in a conspicuous place in a common area of the residential hotel so that it is accessible to occupants at all times, easily readable, protected from the weather, and visible from the common area. For the purpose of this section, a common area includes, but is not limited to, a common corridor or passageway, a laundry room, the area adjacent to a grouped mailbox location, or an area adjacent to the manager's office.

(e) A person commits an offense if he knowingly removes or mutilates a posted notice required under Subsection (c).

(f) It is a defense to prosecution under Subsection (e) that the person was authorized by the owner to

replace the notice in order to correct the information. (Ord. 22154)

SEC. 27-21. INSPECTIONS; MAINTENANCE OF RECORDS.

(a) The owner of a residential hotel shall maintain at a single location the business records of the residential hotel, including, but not limited to, a record of the rental payments for each guest room during each payment period and a record of the identity of each occupant, including children, of every guest room.

(b) The director may inspect a residential hotel and the records of the residential hotel at any reasonable time to ensure compliance with this article.

(c) The director may inspect, at a reasonable time, the records of a person who operates a structure to determine if the structure is a residential hotel. (Ord. Nos. 15198; 19234; 22154)

SEC. 27-22. REQUIRED FACILITIES.

A person who operates a residential hotel shall maintain each guest room and its surrounding premises in a sanitary condition at all times and provide and maintain in operating condition:

(1) one flush toilet, one lavatory basin, and one bathtub or shower for each eight persons, or less, who reside in the structure;

(2) sanitary facilities described in Subsection (1) in places accessible to each occupant without requiring an

occupant to pass through a guest room other than the occupant's own in order to enter a sanitary facility;

(3) exit lights and emergency exit lights placed and maintained in accordance with the Dallas Building Code;

(4) a 2A10BC rated fire extinguisher for each 2,500 square feet or less of floor area, with not less than one extinguisher for each floor of the structure;

(5) smoke detection alarms capable of warning each occupant of fire and being heard from any point of the structure, or equivalent devices approved by the fire marshal;

(6) a means of egress from each guest room to the outside, without passing through another guest room, in compliance with the Dallas Fire Code and the Dallas Building Code; and

(7) for any residential hotel issued a certificate of occupancy after August 10, 1994, a single entrance to the residential hotel through which all persons must pass before entering individual guest rooms. (Ord. Nos. 15198; 19234; 22154)

SEC. 27-23. COOKING FOOD PROHIBITED.

A person commits an offense if he cooks food in a guest room of a residential hotel that contains no kitchen or kitchenette. (Ord. Nos. 15198; 19234; 22154)

ARTICLE VI.

MASTER METERED UTILITIES.

SEC. 27-24. DEFINITIONS.

In this article:

(1) MASTER METERED APARTMENT BUILDING means a building or group of buildings on a single premise containing more than four dwelling units that are leased to occupants who are provided one or more utility services for which they do not pay the utility company directly.

(2) PROPERTY MANAGER means the person, firm, or corporation that collects or receives rental payments, or has responsibility for paying utility bills for a master metered apartment building.

(3) UTILITY COMPANY means the entity providing gas, electric, or water and wastewater service to a master metered apartment building.

(4) UTILITY INTERRUPTION means the termination of utility service to a master metered apartment building by a utility company for nonpayment of billed service. (Ord. Nos. 16232; 18591; 19234)

SEC. 27-25. RECORDS OF OWNERSHIP AND MANAGEMENT MAINTAINED BY UTILITY COMPANIES.

(a) Before providing utility service to a new account at a master metered apartment building, a utility company shall obtain the names and addresses of:

(1) the owner or owners of the building;

(2) the property manager responsible for paying the utility bills; and

(3) the first lienholder, if any,

(b) The utility company shall maintain a record of the information obtained under Subsection (a) and shall make it available to the director upon request.

(c) The applicant for utility service shall provide the information required in Subsection (a) to the utility company. (Ord. Nos. 16232; 18591; 19234)

SEC. 27-26. NOTICE TO TENANTS.

(a) The owner or property manager of a master metered apartment building shall post and maintain a notice in accordance with Subsection (b) containing the name, address, and telephone number of the person with authority and responsibility for making payment to the utility companies for utility bills. The owner or property manager shall correct the notice within 10 days of any change in the information given in the notice.

(b) The notice must be posted in a conspicuous place in a common area of the master metered apartment building so that it is accessible to tenants at all times, easily readable, protected from the weather, and visible from the common area. For the purpose of this section a common area includes, but is not limited to, a common corridor or passageway, a laundry room, the area adjacent to a grouped mail box location, or an area adjacent to the manager's office.

(c) For the purpose of this section the notice may be placed on the inside of a glass door or window in the manager's office or a tenant's apartment so long as all requirements of Subsection (b) are met.

(d) A person commits an offense if he knowingly removes or mutilates a posted notice required under Subsection (a).

(e) It is a defense to prosecution under Subsection (d) if the person was authorized by the owner or property manager to replace the notice in order to correct the information. (Ord. Nos. 16232; 18591; 19234)

SEC. 27-27. NOTICE OF UTILITY INTERRUPTION.

(a) A utility company shall make a reasonable effort (including, but not limited to messenger delivery) to provide notice of a pending utility interruption to tenants of a master metered apartment building.

(b) A person commits an offense if he knowingly:

(1) interferes with an employee of a utility company posting notices of a utility interruption at dwelling units of a master metered apartment building; or

(2) removes a notice of utility interruption posted at a dwelling unit of a master metered apartment building.

(c) It is a defense to prosecution under Subsection (b)(2) that the person is the resident of the dwelling unit from which notice was removed.

(d) A utility company shall notify the city attorney of any utility interruption to a master metered apartment

unit resulting from a violation of Section 27-28 of this article. Notice must be given, in writing, not more than three days after utility service is interrupted. (Ord. Nos. 16232; 18591; 19234)

SEC. 27-28. NONPAYMENT OF UTILITY BILLS – ESSENTIAL UTILITY SERVICE.

(a) The owner or property manager of a master metered apartment building commits an offense if he fails to pay a utility bill and the nonpayment results in the interruption to any apartment unit of a utility service essential to the habitability of the unit and to the health of the occupants. Essential utility services are gas, electric, and water and wastewater services.

(b) The owner or property manager of a master metered apartment building who violates Subsection (a) is guilty of a separate offense for each apartment unit to which utility service is interrupted.

(c) It is a defense to prosecution under this section that the tenant occupying an apartment unit to which utility service is interrupted is in arrears in rent to the owner or property manager of the master metered apartment building. (Ord. Nos. 18591; 19234)

ARTICLE VII.

LICENSING OF APARTMENT COMPLEXES.

SEC. 27-29. DEFINITIONS.

In this article:

(1) APARTMENT COMPLEX means a building or group of buildings located on a single premises and containing three or more dwelling units that are leased or offered for lease to the occupants.

(2) LICENSEE means any person who has been issued an apartment complex license under this article. (Ord. Nos. 22205; 22695)

SEC. 27-30. AUTHORITY OF DIRECTOR.

The director shall implement and enforce this article and may by written order establish such rules, regulations, or procedures, not inconsistent with this article, as the director determines are necessary to discharge any duty under or to effect the policy of this article. (Ord. Nos. 22205; 22695)

SEC. 27-31. LICENSE REQUIRED; DEFENSES.

(a) A person commits an offense if he owns or operates an apartment complex in the city without a valid apartment complex license issued under this article.

(b) It is a defense to prosecution under this section that:

(1) within the preceding five years, the apartment complex was constructed and issued a certificate of occupancy; or

(2) within the preceding two years, a major rehabilitation project was completed at the apartment complex, which project cost not less than an amount equal to $20,000 times the number of dwelling units in the complex. (Ord. Nos. 22205; 22695)

SEC. 27-32. LICENSE APPLICATION.

To obtain an apartment complex license, a person must submit an application on a form provided for that purpose to the director. The applicant must be the person who will own, control, or operate the apartment complex. The application must be verified and contain the following information:

(1) the applicant's name, address, telephone number, and verified signature;

(2) the name, address, and main telephone number, if any, of the apartment complex;

(3) the name, address, and telephone number of a person to contact in an emergency;

(4) the form of business of the applicant and, if the business is a corporation or association, a copy of the documents establishing the business;

(5) the number of dwelling units in the apartment complex;

(6) documentary evidence of payment of ad valorem taxes owed in connection with the apartment complex; and

(7) such additional information as the applicant desires to include or that the director deems necessary to aid in the determination of whether the requested license should be granted. (Ord. Nos. 22205; 22695)

SEC. 27-33. LICENSE FEES.

(a) The annual fee for an apartment complex license is an amount equal to:

(1) no fee for an apartment complex that:

(A) previously passed annual inspections in two consecutive years, either initially or upon the first reinspection; and

(B) had no violations of this chapter, any other city ordinance, or any state or federal law applicable to the operation of an apartment complex in any license year following the two-consecutive-year period in which the inspections were passed;

(2) $2 times the number of dwelling units in the apartment complex, whether occupied or unoccupied, for an apartment complex that passes its current annual inspection, either initially or upon the first reinspection, but does not meet all of the requirements set forth in Paragraphs (1)(A) and (B) of this subsection; or

(3) $9.40 times the number of dwelling units in the apartment complex, whether occupied or unoccupied,

for an apartment complex that fails its current annual inspection, both initially and upon the first reinspection.

(b) No apartment complex with outstanding fees assessed under this article may pass an inspection.

(c) No refund of a license fee will be made. (Ord. Nos. 22205; 22695; 22906)

SEC. 27-34. ISSUANCE, DENIAL, AND DISPLAY OF LICENSE.

(a) Upon payment of all required fees, the director shall issue an apartment complex license to the applicant if the director determines that the applicant:

(1) has complied with all requirements for issuance of the license;

(2) has not made a false statement as to a material matter in an application for a license; and

(3) has no outstanding fees assessed under this article.

(b) If the director determines that the requirements of Subsection (a) have not been met, the director shall deny an apartment complex license to the applicant.

(c) If the director determines that an applicant should be denied an apartment complex license, the director shall notify the applicant in writing that the application is denied and include in the notice the reason for denial and a statement informing the applicant of the right of appeal.

(d) A license issued under this section must be displayed to the public in a manner and location approved

by the director. A license must be presented upon request to the director or to a peace officer for examination. (Ord. Nos. 22205; 22695)

SEC. 27-35. REVOCATION OF LICENSE.

(a) The director shall revoke any apartment complex license if the director determines that the licensee:

(1) failed to comply with any provision of this chapter, any other city ordinance, or any state or federal law applicable to the operation of an apartment complex;

(2) intentionally made a false statement as to a material matter in the application or in a hearing concerning the apartment complex license; or

(3) failed to pay a fee required by this article at the time it was due.

(b) Before revoking a license under Subsection (a), the director shall notify the licensee in writing that the license is being considered for revocation. The notice must include the reason for the proposed revocation, action the licensee must take to prevent the revocation, and a statement that the licensee has 10 days to comply with the notice.

(c) If, after 10 days from receipt of the notice required in Subsection (b), the licensee has not complied with the notice, the director shall revoke the license and notify the licensee in writing of the revocation. The notice must include the reason for the revocation, the date the director orders the revocation, and a statement informing the licensee of the right of appeal. (Ord. Nos. 22205; 22695)

SEC. 27-36. APPEALS.

If the director denies issuance of a license or a license renewal or revokes a license issued pursuant to this article, this action is final unless the licensee files an appeal with a permit and license appeal board in accordance with Section 2-96 of this code. (Ord. Nos. 22205; 22695)

SEC. 27-37. AMENDMENTS TO LICENSE.

Minor amendments to an apartment complex license may be made by the director upon written request by a licensee. An amendment that substantially changes the scope of the license must be applied for in the same manner as the original license. (Ord. Nos. 22205; 22695)

SEC. 27-38. EXPIRATION AND RENEWAL OF LICENSE.

An apartment complex license expires one year from the date of issuance and may be renewed by making application in accordance with Section 27-32. A licensee shall apply for renewal at least 30 days before the expiration of the license. (Ord. Nos. 22205; 22695)

SEC. 27-39. NONTRANSFERABILITY.

An apartment complex license is not transferable without written permission of the director. (Ord. Nos. 22205; 22695)

SEC. 27-40. LICENSEE'S RECORDS.

Each licensee shall maintain at a single location business records of the apartment complex. A licensee shall make those records available for inspection by the director at reasonable times upon request. (Ord. Nos. 22205; 22695)

SEC. 27-41. FAILURE TO PAY AD VALOREM TAXES.

A licensee or an applicant for an apartment complex license shall not allow the payment of ad valorem taxes owed in connection with the apartment complex to become delinquent. (Ord. Nos. 22205; 22695)

SEC. 27-42. NOTIFICATION OF CHANGE OF INFORMATION.

A licensee shall notify the director within 10 days of any material change in the information contained in the license application. (Ord. Nos. 22205; 22695)

SEC. 27-43. INSPECTIONS; REINSPECTION FEES.

(a) The director may inspect any apartment complex in the city for code violations in accordance with Section 27-5 of this chapter.

(b) Whenever an apartment complex is inspected by the director and a violation of this code is found, the building or premises will, after the expiration of any time limit for compliance given in a notice or order issued because of the violation, be reinspected by the director to determine that the violation has been eliminated.

(c) The owner, occupant, operator, or other person responsible for the violation shall pay to the director the following fees for each reinspection after the first reinspection that must be conducted before the violation is determined to be eliminated:

(1) For a reinspection conducted inside dwelling units, the fee is $30 times the number of dwelling units actually reinspected.

(2) For a reinspection of the exterior and common areas of an apartment complex, the fee is $30.

(d) The owner or operator of an apartment complex shall display to the public, in a manner and location approved by the director, all inspection results of the apartment complex. (Ord. Nos. 22205; 22695)